Supreme Court, U.S.
FILED
159 No. 09-1303 APR 22 2010
OFFICE OF THE CLERK

In The Supreme Court of the United States

DON W. SMITH AND DONNA L. SMITH,
Petitioners,

v.

MICHAEL R. MCCARTHY,
IN HIS INDIVIDUAL CAPACITY AND IN HIS CAPACITY AS A NELSON COUNTY DEPUTY SHERIFF, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Bruce Karl Tyler
ATTORNEY AT LAW
Post Office Box 2
129 Afton Depot Lane
Afton, Virginia 22920-0002
(540) 943-0932
aftonlaw@cfw.net

Counsel of Record for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

In a highly unethical decision flagrantly violative of well-established law governing motions under F.R.Civ.P. 12(b)(1) and 12(b)(6), qualified and absolute immunity under §1983 of Title 42 of the United States Code, and limitation of actions for civil conspiracy actions under §1983, the Fourth Circuit Court of Appeals affirmed the final order and memorandum opinion of the United States District Court for the Western District of Virginia entered on January 7, 2009, dismissing the §1983 complaint of petitioners Don W. Smith and Donna L. Smith after granting motions to dismiss filed by nine (9) individual state respondents and two (2) entity respondents under Rule 12(b)(1) and Rule 12(b)(6). That complaint, consisting of thirteen (13) pages of detailed factual allegations and eighteen (18) pages of exhibits, nine (9) of which were generated by the respondents, clearly satisfied all requirements of Rule 12(b)(1) and (6). Nevertheless, obviously intending to shield the nine (9) individual Virginia law enforcement officials and officers from financial liability for their egregious violation of petitioners' civil rights, the Fourth Circuit (like the District Court) far exceeded the scope of judicial authority under Rule 12(b)(1) and Rule 12(b)(6) by using them to engage in judicial fact-finding to establish *as proven* defenses not properly raised by any respondent in their motions and to void the very the gravamen of the complaint, thus depriving petitioners of their right to a jury in a civil trial under the Seventh Amendment. The decision directly conflicts with the holdings of every Circuit Court of Appeals, including the Fourth Circuit,

which has considered the issues and numerous decisions of the United States Supreme Court.

Five questions, some of which are of first impression, are presented:

1. Whether the Fourth Circuit by sanctioning the improper us of a Rule (b)(6) and failing to assume that all allegations of the complaint are true, to construe the complaint in the light most favorable to petitioners, to make all reasonable inferences in favor of petitioners and to determine, under any reasonable reading of the complaint, that petitioners were entitled to relief, imposed a standard of pleading in §1983 civil cases which is possible to meet, has no foundation in law, and thus denied petitioners their right to discovery and their Seventh Amendment right to a jury in a civil action by finding a demonstrably corrupt conviction, the very objective of the civil conspiracy, valid.

2. Whether the Fourth Circuit circumvented well-established §1983 civil rights law by affirming the District Court's grant of qualified immunity to respondents McCarthy, Bridgwater, Dixon and Brantley, even though they had the burden of proof on the issue, and in spite of the detailed allegations of the complaint showing joint and several constitutional violations, including without limitation, the malicious wounding of petitioner Donna L. Smith, breach of duty to arrest, illegal arrest, search, seizure and imprisonment of both Smiths, fabrication and/or alteration of evidence, failure to provide exculpatory evidence, reckless or

callous supervisory indifference to petitioners' rights, and perjury.

3. Whether the Fourth Circuit circumvented well-established law relating to limitation of actions based on conspiracy, in dismissing the claims of the Smiths against respondents McCarthy, Bridgwater, Dixon, Brantley and Payne on February 16, 2006, as barred by the applicable statute of limitations by batching together all the acts of that day rather than separating them on the basis of whether the act occurred before or after the malicious wounding of Donna Smith.

4. Whether the Fourth Circuit circumvented well-established §1983 civil rights law by affirming the dismissal of the complaint against respondent Payne by applying a faulty statute of limitations defense to his action's after impermissibly finding him vested with absolute immunity with respect to certain extrajudicial actions.

5. Whether the Fourth Circuit Court of Appeals circumvented well-established §1983 civil rights law, in affirming the district court's grant of qualified immunity to respondents Rader, Dion, McDonnell and Kaine when it found all four to have qualified immunity, and Dion and McDonnell to have absolute immunity, in violation of multiple decisions of the United States Supreme Court in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), *Owen v. City of Independence*, 445 U.S. 622 (1980) and *Pembuar v. City of Cincinnati*, 475 U.S. 469 (1986).

LIST OF PARTIES

The parties include petitioners Don W. Smith and Donna L. Smith (hereinafter collectively, "petitioners" or "Smiths", or individually, "Don Smith" and "Donna Smith") and respondents Michael R. McCarthy, Malcolm E. Bridgwater, John M. Dixon, II, and Gary L. Brantley (hereinafter collectively the "sheriff respondents" or individually as "McCarthy" or "Bridgwater" or "Dixon" or "Brantley"), Phillip D. Payne, IV, (hereinafter "respondent" or "Payne"), Joseph L. Rader, Shannon Y. Dion, Robert F. McDonnell and Timothy M. Kaine (hereinafter collectively "individual state respondents" or individually as "Rader" or "Dion" or "McDonnell" or "Kaine").

CORPORATE DISCLOSURE STATEMENT

All parties are individual residents and citizens of the Commonwealth of Virginia and the United States of America.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

LIST OF PARTIES iv

CORPORATE DISCLOSURE STATEMENT..... ..iv

TABLE OF CONTENTS.....v

TABLE OF CITED AUTHORITIES.....x

OPINION BELOW.....1

STATEMENT OF JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....3

REASONS FOR ALLOWANCE OF THE WRIT.....5

I. REVIEW IS WARRANTED BECAUSE THE FOURTH CIRCUIT, BY SANCTIONING THE IMPROPER USE OF A RULE 12(B)(6) MOTION AND FAILING TO ASSUME THAT ALL ALLEGATIONS OF THE COMPLAINT ARE TRUE, TO CONSTRUE THE COMPLAINT IN THE LIGHT MOST FAVORABLE TO PETITIONERS, TO MAKE ALL REASONABLE INFERENCES IN FAVOR OF PETITIONERS AND TO DETERMINE, UNDER ANY REASONABLE READING OF THE COMPLAINT, THAT PETITIONERS WERE

ENTITLED TO RELIEF, IMPOSED A STANDARD OF PLEADING FACTS IN §1983 CIVIL CASES WHICH IS IMPOSSIBLE TO MEET, HAS NO FOUNDATION IN LAW, AND DENIED PETITIONERS THEIR RIGHT TO DISCOVERY AND THEIR SEVENTH AMENDMENT RIGHT TO A JURY IN A CIVIL ACTION BY FINDING A DEMONSTRABLY CORRUPT CONVICTION, THE VERY OBJECTIVE OF THE CIVIL CONSPIRACY, VALID.....7

II. THE FOURTH CIRCUIT IGNORED WELL-ESTABLISHED §1983 CIVIL RIGHTS LAW IN AFFIRMING THE DISTRICT COURT'S GRANT OF QUALIFIED IMMUNITY TO RESPONDENTS MCCARTHY, BRIDGWATER, DIXON AND BRANTLEY, EVEN THOUGH THEY HAD THE BURDEN OF PROOF ON THE ISSUE, AND IN SPITE OF THE DETAILED ALLEGATIONS OF THE COMPLAINT SHOWING JOINT AND SEVERAL CONSTITUTIONAL VIOLATIONS, INCLUDING WITHOUT LIMITATION, THE MALICIOUS WOUNDING OF PETITIONER DONNA SMITH, BREACH OF DUTY TO ARREST, ILLEGAL ARREST, SEARCH, SEIZURE AND FALSE IMPRISONMENT, FABRICATION AND/OR ALTERATION OF EVIDENCE, FAILURE TO PROVIDE EXCULPATORY EVIDENCE, RECKLESS SUPERVISORY INDIFFERENCE TO PETITIONERS' RIGHTS, AND PERJURY.....12

III. REVIEW IS WARRANTED BECAUSE THE FOURTH CIRCUIT CIRCUMVENTED THE LAW RELATING TO LIMITATION OF ACTIONS

BASED ON CONSPIRACY BY DISMISSING THE CLAIMS OF THE SMITHS AGAINST RESPONDENTS MCCARTHY, BRIDGWATER, DIXON, BRANTLEY AND PAYNE ON FEBRUARY 16, 2006, AS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS BY BATCHING TOGETHER ALL THE ACTS OF THAT DAY RATHER THAN SEPARATING THEM ON THE BASIS OF WHETHER THE ACT OCCURRED BEFORE OR AFTER THE MALICIOUS WOUNDING OF DONNA SMITH.....17

IV. REVIEW IS WARRANTED BECAUSE THE FOURTH CIRCUIT AFFIRMS A DISMISSAL OF THE COMPLAINT AGAINST RESPONDENT PAYNE BY APPLYING A FAULTY STATUTE OF LIMITATIONS DEFENSE TO RESPONDENT PAYNE'S ACTIONS AFTER IMPERMISSIBLY FINDING HIM VESTED WITH ABSOLUTE IMMUNITY WITH RESPECT TO CERTAIN EXTRAJUDICIAL ACTIONS. 20

V. REVIEW IS WARRANTED BECAUSE THE FOURTH CIRCUIT FINDS THE STATE RESPONDENTS TO BE VESTED WITH QUALIFIED IMMUNITY AND, WITH RESPECT TO MCDONNELL AND DION, FINDS THEM VESTED WITH ABSOLUTE IMMUNITY, SUCH FINDINGS IN CONFLICT WITH MULTIPLE DECISIONS OF THE UNITED STATES SUPREME COURT, INCLUDING BUT NOT LIMITED TO, *MONELL V. NEW YORK CITY DEPT. OF SOCIAL SERVICES*, 436 U.S. 658 (1978), *PEMBUAR V. CITY OF CINCINNATI*, 475 U.S. 469 (1986), *CITY OF ST. LOUIS V.*

PRAPROTNIK, 485 U.S. 112 (1988) AND *OWEN V. CITY OF INDEPENDENCE*, 445 U.S. 622 (1980). 23

CONCLUSION.....29

TABLE OF APPENDICES

Appendix A----Opinion Of The United States Court Of Appeals for the Fourth Circuit dated and decided October 29, 2009, and the Order on Rehearing entered January 22, 2010.....1a

Appendix B---Memorandum Opinion of the United States District Court for the Western District of Virginia dated and decided January 7, 2009.....19a

Appendix C---Complaint of Don W. and Donna L. Smith filed under §1983 of Title 42 of the United States Code on August 1, 2008, in the United States District Court for the Western District of Virginia.....66a

Appendix D--Motion to dismiss filed October 21, 2008, of respondents Joseph L. Rader, Shannon Y. Dion, Robert F. McDonnell and Timothy M. Kaine.....104a

Appendix E--Motion to dismiss filed October 27, 2008, of respondents Michael R. McCarthy, Malcolm E. Bridgwater, John M. Dixon, II, and Gary L. Brantley.....106a

Appendix F--Motion to dismiss filed October 28, 2008, of respondent Phillip D. Payne, IV.....108a

TABLE OF CITED AUTHORITIES

Page

Adams v. Bain,
697 F. 2d 1213 (4th Cir. 1982) 9

Anderson v. Branen,
17 F.3d 552, 556 (2d Cir. 1994).....14

Broad Street Assocs. v. United Cos.Life Ins.Co.,
163 Bankr.68 (Bankr. E.D.Va 1993).....8

Brown v. Elliot, 225 U.S. 392, 401,
32 S.Ct. 812, 815, 56 L.Ed. 1136 (1912).....20

Buckley v. Fitzsimmons,
509 U.S. 25 (1993).....6, 20

Burns v. Reed, 500 U.S. 478(1991).....6, 20

Byrd v. Brishke,
466 F.2d 6 (7th Cir. 1972).....14

Carter v. Burch,
34 F.3d 257 (4th Cir.1994).....21

City of St. Louis v. Praprotnik,
485 U.S. 112 (1988) 7, 24, 28

Davis. v. City of Portsmouth,
579 F.Supp. 1205 (E.D. Va. 1983).....9

Fayetteville Investors v. Commercial Builders,
Inc., 936 F.2d 1462, 1465 (4th Cir.1991).....8

Fiswick v. United States, 329 U.S. 211,
67 S. Ct. 224, 91 L. Ed. 196 (1946).....20

Gagnon v. Ball, 696 F.2d 17, 21 (2d Cir. 1982).....14

Hafer v. Melo, 502 U.S. 21 (1991).....25

Larez v. City of Los Angeles,
946 F.2d 630 (9th Cir. 1991).....13

Menotti v. City of Seattle,
409 F.3d 1113 (9th Cir. 2005).....13

Monell v. New York City Dep.of Social Services, 436 U.S. 658 (1978).....7, 24, 29

Owen v. City of Independence,
445 U.S. 622 (1980).....7, 24, 29

Pembaur v. City of Cincinnati,
475 U.S. 469 (1986) 7, 24, 29

Pottawattamie County, Iowa, et al. v. Terry J. Harrington, et al., Record No. 08-1065.....7

Riccuiti v. NYC Transt. Auth.,
125 F.3d 123 (2d Cir. 1997).....14

Richardson v. Fleming,
651 F.2d 366 (5th Cir. 1981).....15

Turner v.Upton County, Texas,
915 F. 2d 133 (1990).....15

Yang v. Hardin,
37 F.3d 282, 285 (7th Cir. 1994).....13

Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000).....14

OPINION BELOW

The unpublished opinion of the Court of Appeals for the Fourth Circuit dated and decided October 28, 2009, affirmed the January 7, 2009, unpublished memorandum opinion and order of the District Court for the Western District of Virginia. Both opinions are appended to this petition with the inordinately numerous footnotes of each listed at the end. By order dated January 22, 2010, the Fourth Circuit denied the Smiths' petition for rehearing.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated* * *.

The Fifth Amendment to the United States Constitution provides, in relevant part:

No person shall* * *be deprived of life, liberty, or property, without due process of law* * *.

The Seventh Amendment to the United States Constitution provides, in relevant part:

In suits at common law* * *the right of trial by jury shall be preserved* * *.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

No State shall make or enforce any law which shall* * *deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the United States Code provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law* * *.

Section 7 of Article VI of the Virginia Constitution provides, in relevant part:

The Governor* * *Attorney General* * *and all officers appointed by the Governor or elected by the General Assembly offending against the Commonwealth by malfeasance in office, corruption,

neglect of duty, or other high crime or misdemeanor may be impeached by the House of Delegates* * *.

Section 2.2-511 of the Code of Virginia (1950), as amended, provides, in relevant part:

A. Unless specifically requested by the Governor to do so, the Attorney General shall have no authority to institute or conduct criminal prosecutions in the circuit courts of the Commonwealth except in cases* * *.

STATEMENT OF THE CASE

1. Because both the Fourth Circuit and the district court were required, in ruling on the Rule 12(b)(1) and Rule 12(b)(6) motions to dismiss, to assume that all allegations of the complaint are true, to construe the complaint in the light most favorable to petitioners, to make all reasonable inferences in favor of petitioners and to determine, under any reasonable reading of the complaint, that petitioners are entitled to relief, petitioners will rely on their complaint and the exhibits, attached as Appendix C for the statement of the factual basis of this case and will, in view of both courts' total disregard of this well-established law which enabled them to make their unwarranted findings, make specific references, where necessary, to the complaint and exhibits in their argument. Nevertheless, simply stated, petitioners allege that, in order to defeat personal injury claims arising from respondent McCarthy's malicious wounding of petitioner Donna Smith on February 16, 2006, the sheriff respondents and respondent Payne, the prosecutor, conspired to

convict petitioners of fabricated charges of obstruction of justice and the objective was achieved as to petitioner Donna Smith on August 2, 2006, in a fixed, corrupt trial in Nelson County, Virginia. Afterwards, petitioners presented the state respondents with overwhelming evidence of the conspiracy but respondents failed to perform their duties under Virginia law and in doing so, the state respondents ratified, condoned and/or acquiesced in the wholesale violation of petitioners' constitutional and civil rights which occurred in the period from February 16, 2006 to the conclusion of the sham trial on August 2, 2006.

2. Petitioners filed their complaint on August 1, 2008. In October, 2008, all respondents filed motions to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6) and motions to amend the standing pretrial order to delay discovery disclosure under Rule 26(a) of the Federal Rules of Civil Procedure until the district court ruled on the motions to dismiss. Respondent Payne also filed a supplemental motion seeking a protective order, essentially a "gag" order against Tyler, alleging unethical conduct implied in his motion as amounting to extortion. The magistrate judge granted the motions to delay discovery disclosure but denied Payne's motion to "gag" Tyler. An uncirculated final order dismissing the case and striking it from the active docket of the court and the memorandum opinion supporting the order were entered on January 7, 2009, without prior notice or circulation to Tyler who thus had no opportunity to file for leave to amend the complaint to meet some of the oral objections, however unfounded, voiced by the district judge at oral

argument on December 19, 2008, as to speculation and/or conjecture on the face of the complaint.

3. Petitioners filed their Notice of Appeal on January 30, 2009. On October 28, 2009, the Fourth Circuit issued its unpublished opinion affirming the district court. On November 10, 2009, petitioners filed a petition for rehearing which was denied on January 22, 2010.

REASONS FOR ALLOWANCE OF THE WRIT

The review, correction and guidance of this Court is urgently warranted because the Fourth Circuit Court of Appeals circumvented well-established §1983 civil rights and federal law in general by affirming the district court's dismissal of petitioners' complaint by granting the motions to dismiss. It cannot be stressed enough that the complaint *easily* met all requirements of pleading under Rule 12(b)(1) and 12(b)(6), that the motions to dismiss should have been overruled and respondents ordered to answer the complaint, discovery conducted and the case submitted to a jury with instructions. Both the district court and the appeals court far exceeded the scope of authority afforded by Rule 12 by using it to make factual findings prohibited by law ostensibly enabling it to find *as proven* the defenses of absolute immunity and qualified immunity which, if not appearing on the face of the complaint, are *always* submitted to the jury with appropriate instructions *or* disposed of by the court on motion *after discovery has been conducted*. In doing so, both courts usurped the

function of the jury and denied petitioners their Seventh Amendment right to a jury in a civil trial. More ominously, the Fourth Circuit, in totally disregarding well-established law, went so far as to actually validate the corrupt August 2, 2006, conviction of petitioner Donna L. Smith, the very objective of the conspiracy for which she was suing respondents.

The review, correction and guidance of this Court is also warranted by the Fourth Circuit's affirmation of the dismissal of the claims of the Smiths against the sheriff respondents and respondent Payne as barred by the applicable statute of limitations by allowing the batching together of *all* the joint and several acts of those respondents on February 16, 2006, rather than separating those which occurred before the malicious wounding of Donna Smith and those which occurred after.

The review, correction and guidance of this Court is urgently warranted to reverse the Fourth Circuit's disregard of the decisions of the United States Supreme Court in *Burns v. Reed*, 500 US. 478 (1991) and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) affirming the dismissal of respondent Payne, finding him to be absolutely immune even though Payne had the burden of proof on the issue, and in spite of the detailed allegations of the complaint showing his advice to the sheriff respondents and administration of the prosecution conspiracy outside of the judicial process.

The review, correction and guidance of this Court is warranted because the Fourth Circuit completely disregarded well-established §1983 law relating to ratification and condonation of, and/or acquiescence in, unconstitutional behavior laid down in detail by decisions of this Court in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), *Pembuar v. City of Cincinnati*, 475 U.S. 469 (1986) *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), and *Owen v. City of Independence*, 445 U.S. 622 (1980) by ruling in favor of petitioners in view of by finding the state respondents to have qualified immunity even though they had the burden of proof on the issue.

In conclusion, the circumstances of this case are similar to, but much more egregious than those in another case in which this Court granted certiorari, to wit: *Pottawattamie County, Iowa, et al. v. Terry J. Harrington, et al.*, Record No. 08-1065. In *Pottawattamie County*

I. REVIEW IS WARRANTED BECAUSE THE FOURTH CIRCUIT, BY SANCTIONING THE IMPROPER USE OF A RULE 12(B)(6) MOTION AND FAILING TO ASSUME THAT ALL ALLEGATIONS OF THE COMPLAINT ARE TRUE, TO CONSTRUE THE COMPLAINT IN THE LIGHT MOST FAVORABLE TO PETITIONERS, TO MAKE ALL REASONABLE INFERENCES IN FAVOR OF PETITIONERS AND TO DETERMINE, UNDER ANY REASONABLE READING OF THE COMPLAINT, THAT PETITIONERS WERE

ENTITLED TO RELIEF, IMPOSED A STANDARD OF PLEADING FACTS IN §1983 CIVIL CASES WHICH IS IMPOSSIBLE TO MEET, HAS NO FOUNDATION IN LAW, AND DENIED PETITIONERS THEIR RIGHT TO DISCOVERY AND THEIR SEVENTH AMENDMENT RIGHT TO A JURY IN A CIVIL ACTION BY FINDING A DEMONSTRABLY CORRUPT CONVICTION, THE VERY OBJECTIVE OF THE CIVIL CONSPIRACY, VALID.

Although the Fourth Circuit modified in places its grounds for affirming the district court, there is no doubt that it wholeheartedly endorsed and adopted the reasoning and approach of the district court when it stated at the outset of its opinion that "in considering motions to dismiss under Rule 12(b)(6), the court may properly consider exhibits attached to the complaint. *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991). Here, as noted above, the Smiths cited to the trial transcript in their complaint, and their counsel filed a copy of the transcript with the trial court, citing his intention to rely upon it in argument on the motions to dismiss. As such, they cannot now justifiably complain about the trial court's consideration of the transcript in rendering its decision or on its reliance on the facts as determined in that proceeding. We have reviewed carefully the record and find no merit to the Smiths' claim that the district court applied the incorrect standard in considering either the trial transcript or the motions to dismiss or in dismissing the Smiths'

complaint." (App. A at 7a). This adoption of the district court's approach is serious error.

At the outset, let it be clear that the motions filed under Rule 12(b)(1), relating to federal jurisdiction, were at best frivolous especially in view of paragraph 1 of the complaint (App. C at 67a), and especially since no respondent alleged any facts of complaint supporting jurisdiction to be false. *Adams v. Bain*, 697 F. 2d 1213 (4th Cir. 1982). Accordingly, in ruling on respondents' motions to dismiss under Rule 12(b)(6), both courts were *required* to assume the truth of the Smith's complaint and construe that complaint in the light most favorable to them. *Davis. v. City of Portsmouth*, 579 F.Supp. 1205 (E.D. Va. 1983). Both courts failed in this required endeavor and violated every standard of review in granting and affirming the granting of all respondents' motions to dismiss because both courts resolved factual issues, usurped the function of the jury, denied petitioners discovery and impermissibly decided the merits of respondents' defenses. All this was ostensibly accomplished on the required assumption of the truth of the allegations! For example, one wonders why the section of the district court's opinion entitled "I. FACTUAL BACKGROUND," would even be included in an opinion disposing of a Rule 12(b)(6) motion. (App. B at 20a). Yet, in using the transcript of the trial, both courts impermissibly considered disputed facts well outside the allegations of the complaint, considered disputed facts tending to favor respondents, and analyzed or quoted, through the use of copious footnotes, wholesale testimony from the very same trial convincingly alleged by petitioners to be fixed

and corrupt and the objective of the respondents' conspiracy.

A prime example of both courts' judicial dishonesty is the district court's characterization McCarthy's malicious wounding of Donna Smith as an "encounter [which] ensued between McCarthy and Mrs. Smith, and McCarthy subdued Mrs. Smith." and the Fourth Circuit's characterization of the malicious wounding as "a physical altercation" although the complaint described the malicious wounding as follows: "Without any warning whatsoever, McCarthy blindsided Donna Smith by smashing her head into the van which "dropped" her into a ditch whereupon he brutally handcuffed her and, in spite of her pleas to just give her time to regain her balance, yanked her to her feet by the handcuffs, causing her wrists to bleed." (App. C at 72a).

This judicial dishonesty is further confirmed by both court's total disregard of the eleven (11) exhibits which were attached to the Smiths' complaint.n about the reliance of the district court and the panel on the "facts determined in that proceeding" because in doing so, both courts have essentially condoned the result of that trial. The result of that trial, the conviction of Donna Smith, was the OBJECT of the conspiracy, the members of which she and her husband are suing under §1983. To repeat, that totally invalid and voidable conviction is the *very subject matter* of the complaint. Yet both courts have accepted as true the version of events testified to by the only two (2) witnesses for the Commonwealth, who obviously were prepared

perjurers and performed feloniously well during the trial, much to the Smiths' damage. Both courts know perfectly well that David Reier has never owned a motor vehicle, much less a green Dodge pickup truck. More importantly, as a result, both courts know perfectly well that McCarthy and Bridgwater committed multiple perjuries in the August 2nd trial.

Another example of the judicial dishonesty before this Court is the Fourth Circuit's knowing reliance on palpably false testimony, tellingly demonstrated when it states in its opinion, in its needless exposition as to probable cause for McCarthy and Bridgwater to enter the property, that "the deputies, who were following up on reports that Reier had been seen in the area driving a green Dodge pickup truck, found a green Dodge pickup truck parked next to the house" (App. A at 3a). By using this in their decisions, both courts accept as true the deputies' false testimony that they received these "reports" while down at the Sheriff's Office when a simple reading of Exhibit "C", the dispatch records which were generated that morning, to establish without a doubt that not only were such "reports" never made but both deputies were in separate cruisers far from Sheriff's Office and went to the Smith residence looking for Reier after failing to locate him at another residence reported to them by the State Trooper.

If either the district court or the Fourth Circuit considered the Smiths' testimony at the August 2nd trial, or the Smiths' eleven (11) exhibits, there is not one iota of that consideration evident in the record

before this court. Returning to the subject of exhibits, neither court considered that Tyler was ejected from a meeting where the police officers were preparing their perjured testimony. (App. C at 94a) Neither court considered the obvious alteration of the dispatch records. (App. C at 75a, 76a, 90a, 91a). Neither court considered Rader's attempt to talk Tyler out of continuing with his duties as an officer of the court to see perjury punished. (App. C at 96a) Neither court considered Payne's failure to appoint a Special Prosecutor which was the ethical thing to do. (App. C at 100a). Both courts, by accepting the result of that trial in order to defeat the Smiths' fully valid civil rights claims, whitewashed that black day of injustice which occurred in Nelson County on August 2, 2006, and in doing so, both courts have engaged in an intellectual dishonesty which strikes at the very heart of their independence, honor, integrity and impartiality.

II. THE FOURTH CIRCUIT IGNORED WELL-ESTABLISHED §1983 CIVIL RIGHTS LAW IN AFFIRMING THE DISTRICT COURT'S GRANT OF QUALIFIED IMMUNITY TO RESPONDENTS MCCARTHY, BRIDGWATER, DIXON AND BRANTLEY, EVEN THOUGH THEY HAD THE BURDEN OF PROOF ON THE ISSUE, AND IN SPITE OF THE DETAILED ALLEGATIONS OF THE COMPLAINT SHOWING JOINT AND SEVERAL CONSTITUTIONAL VIOLATIONS, INCLUDING WITHOUT LIMITATION, THE MALICIOUS WOUNDING OF PETITIONER DONNA SMITH, BREACH OF DUTY TO ARREST, ILLEGAL ARREST, SEARCH, SEIZURE AND FALSE

IMPRISONMENT, FABRICATION AND/OR ALTERATION OF EVIDENCE, FAILURE TO PROVIDE EXCULPATORY EVIDENCE, RECKLESS SUPERVISORY INDIFFERENCE TO PETITIONERS' RIGHTS, AND PERJURY.

It does not even require a citation of authority to confirm that McCarthy's malicious wounding of Donna Smith constituted a constitutional violation of her civil rights. Bridgwater, present at the time of the malicious wounding, had not only a constitutional duty to arrest McCarthy but also a duty to refrain from aiding in the arrest of petitioners. *Yang v. Hardin*, 37 F. 3d 105 (7th Cir. 1998). And so it was with Dixon and Brantley, the two highest ranking members of the Nelson County Sheriff's Department, who, when they arrived at the scene, having been previously informed of McCarthy's criminal conduct, a reasonable inference of the complaint, also had a duty to arrest McCarthy and free the Smiths because, as supervisors of McCarthy, they were not entitled to acquiesce or be indifferent to that despicable act of McCarthy. *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991); *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005).

As soon as Dixon and Brantley failed in those duties to arrest McCarthy and free the Smiths, they, for all intents and purposes, joined with Bridgwater and McCarthy, and at some point with Payne, in the conspiracy to convict the Smiths. Both spent considerable time at the scene with McCarthy and Bridgwater, ultimately condoning, approving and/or ordering the bogus arrests of the Smiths on the

fabricated charges of obstruction of justice, although both should have never allowed it. *Gagnon v. Ball*, 696 F.2d 17, 21 (2d Cir. 1982); *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972). Bridgwater, Dixon and Brantley had an affirmative duty to intervene to protect the constitutional rights of Smiths from the initial gross violation by McCarthy infringement by other law enforcement officers in their presence, especially since they knew that excessive force was used, that the Smiths had been unjustifiably arrested and that the malicious wounding of Donna Smith was a gross constitutional violation. *Anderson v. Branen*, 17 F.3d 552 (2d Cir. 1994)

Moreover, both Dixon and Brantley were aware of McCarthy's and Payne's activities from February 16, 2006, to August 2, 2006. Brantley was present at the time Bridgwater and Captain Dixon were fixing their testimony before trial and he knew that Bridgwater and McCarthy were going to perjure themselves. (App. C at 74a, 94a). Brantley and Dixon both knew or should have known that dispatch records had been altered, enlarged or deleted and that the "Confidential Supplement" was the "official" version of the events concocted by Payne to "criminalize" Donna Smith and are liable for those acts. (App. C at 73a-74a, 88a and 90a); *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000); *Riccuiti v. NYC Transit Auth.*, 125 F.3d 123 (2d Cir. 1997).

Bridgwater, Dixon and Brantley are not only liable for their own acts and omissions but also for each and every act of McCarthy and Payne performed in furtherance of the conspiracy. Although

Payne was not present at the scene, he was advising the sheriff respondents what to do with the Smiths in that hour or so interval between McCarthy's attack and the release of the Smiths on the summonses. The Smiths have alleged a conspiracy among the five to deprive them of rights guaranteed by federal law and accordingly, each member of them are liable for the effects of the deprivation because liability arises from their membership in the conspiracy and from the basic principle that one conspirator is vicariously liable for the acts of his co-conspirators. *Richardson v. Fleming*, 651 F.2d 366 (5th Cir. 1981); *Turner v. Upton County,Texas*, 915 F.2d 133 (5th Cir. 1990)

There is no doubt that the complaint more than sufficiently alleged the liability of the sheriff respondents. Nevertheless, in total contempt and utter disregard of the overwhelming amount of law to this effect, the Fourth Circuit stated that "the district court did not engage in improper fact-finding, or otherwise err, in determining that the officers were entitled to qualified immunity because the Smiths failed to allege a meeting of the minds, a necessary element of a conspiracy, and because the allegations of conspiracy were conclusory" stating that the claim of conspiracy by the Smiths "is wholly conclusory and devoid of of sufficient allegation of a meeting of the minds." (App. A at 10a).

First, the statement by the panel is simply not true. Cannot an allegation of a "meeting of the minds," which the court treats as a sort of missing mantra fatal to the sufficiency of petitioners' complaint, be found in the allegations that

respondents "individually and in concert with each other, agreed, combined and conspired" to criminalize the Smiths as set forth in paragraph 29 of the complaint? It boggles the mind that the Fourth Circuit makes such an outrageous statement to support the dismissal, *on qualified immunity grounds*, of four law enforcement officers and one prosecutor, one of whom maliciously wounded Donna Smith while the others protect him so he can escape arrest and prosecution for a serious crime, in complete denial of the detailed allegations of paragraphs 29, 30 and 31 (App. C at 78a-80a).

Nevertheless, in an attempt to justify its completely unwarranted ruling, the Fourth Circuit focuses *only* on the cell phone conversation set forth in the complaint. It is a fair and reasonable inference that the officers were talking on cell phones out of the earshot of the Smiths because they did not want the Smiths to hear their conversation which they certainly did not want the conversation to be on the dispatch records. Why? Because they were conferring with Payne about what to do about McCarthy's felonious act. Who else would they be talking to? And this is the basic problem of the two lower courts. What legal justification could there be for denying the Smiths the right to ask questions of the respondents in order to confirm this strong suspicion in the discovery they are entitled to under the law? This is a civil case yet the district court and the Fourth Circuit wrongly assumed that the sum total of the evidence against all respondents is shown on the face of the complaint. Each court analyzes the complaint as though a motion for judgment of acquittal were before it because both

well know that if discovery proceeds, most if not all the respondents will have Fifth Amendment issues to deal with. The right against self-incrimination but it is unconscionable, in order to protect those respondents from having to make the decision, that both courts have denied the Smiths their full rights of discovery and jury trial under the Seventh Amendment. respondents. Most importantly, each and every decision relied upon by both courts in dismissing all the respondents was well beyond the "motion to dismiss" stage, that is, the decisions were made after answers to the complaint had been filed, after affirmative and other defenses asserted, after discovery had been completed and after trial, or upon a motion for summary judgment.

III. REVIEW IS WARRANTED BECAUSE THE FOURTH CIRCUIT CIRCUMVENTED THE LAW RELATING TO LIMITATION OF ACTIONS BASED ON CONSPIRACY BY DISMISSING THE CLAIMS OF THE SMITHS AGAINST RESPONDENTS MCCARTHY, BRIDGWATER, DIXON, BRANTLEY AND PAYNE ON FEBRUARY 16, 2006, AS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS BY BATCHING TOGETHER ALL THE ACTS OF THAT DAY RATHER THAN SEPARATING THEM ON THE BASIS OF WHETHER THE ACT OCCURRED BEFORE OR AFTER THE MALICIOUS WOUNDING OF DONNA SMITH.

In paragraph 29 of their complaint, petitioners clearly state, as they have stated throughout this litigation, that all claims relating to

the initial entry of McCarthy and Bridgwater onto the Smiths' property, *with or without probable cause,* the stopping of Donna Smith and the ordering of her out of her van prior to her malicious wounding are the subject of the separate state court action. (App. C at 78a). Yet ignoring this clarity, both courts employ a muddled reasoning with respect to the two year statute of limitations for a civil action for §1983 conspiracy in a disingenuous attempt to protect the sheriff respondents and Payne from the consequences of their actions in that conspiracy by batching *all* their illegal acts of February 16, 2006, together rather than separating, as the complaint does and the law requires, which occurred before Donna Smith was maliciously wounded by McCarthy and those occurring after. In another attempt to erase the legal significance of the events of February 16, 2006, both courts spend an inordinate amount of time needlessly analyzing the initial entry of McCarthy and Bridgwater onto the Smith property in terms of probable cause. These analyses are completely irrelevant and immaterial to the case at bar because the conspiracy to convict the Smiths so as protect McCarthy from the criminal and civil consequences flowing from McCarthy's completed felony began with his malicious wounding of Donna Smith and Bridgwater's simultaneous awareness of the same. Assuming the entry occurred with probable cause, or even if the Smiths invited the officers onto the property, that would hardly be a defense to the malicious wounding.

Returning to the limitations issue, in passing on the sheriff respondents' position that some of the Smiths' claims relating to the events of February 16,

2006, were barred by the two year statute of limitations, the district court, in the first display of this convoluted reasoning, stated "...the complaint was filed on August 1, 2008, and any claims regarding the events of February 16, 2006 -- excessive force, violations of Petitioners' due process rights, illegal entry upon Petitioners' property, illegal search and seizure, etc. -- are untimely and therefore fail to state a claim upon which relief may be granted." (App. B at 38a). Concerned about how the "etc." in the district court opinion could be construed, petitioners raised the issue on appeal and were at first pleased to see the Fourth Circuit seemingly affirm their position that they are entitled to damages for the acts of the conspiracy which began immediately after the malicious wounding of Donna Smith and the subjugation of Don Smith when it stated "the district court did not include the Smiths' conspiracy claims in its dismissal on statute of limitations grounds, but rather those claims relating solely to the events of February 16, 2006." (App. A at 8a, 9a) But as soon as the Fourth Circuit concedes this, it apparently takes it away when it states " to the extent the Smiths sought to raise claims in their August 1, 2008, complaint expressly relating to the events of February 16, 2006, the district court correctly dismissed such claims as barred by the statute of limitations." (App. A at 9a). Accordingly, to the extent that the ruling of either court purports to release these respondents from liability for any of their actions of February 16, 2006, which occurred *after* McCarthy's malicious wounding as barred by the statute of limitations, the ruling is totally without foundation in law. Because all of the illegal acts complained of by the Smiths occurred

after the wounding were in furtherance of the conspiracy, the two year statute of limitations on conspiracy claims begins when the objective of the conspiracy, the last overt act, is attained. That objective, the last overt act, the conviction of Donna Smith, occurred on August 2, 2006, and thus the complaint was timely filed on August 1, 2008. *Fiswick v. United States*, 329 U.S. 211, 67 S.Ct. 224, 91 L.Ed. 196 (1946); *Brown v. Elliot*, 225 U.S. 392, 401, 32 S.Ct. 812, 815, 56 L.Ed. 1136 (1912).

IV. REVIEW IS WARRANTED BECAUSE THE FOURTH CIRCUIT AFFIRMS A DISMISSAL OF THE COMPLAINT AGAINST RESPONDENT PAYNE BY APPLYING A FAULTY STATUTE OF LIMITATIONS DEFENSE TO RESPONDENT PAYNE'S ACTIONS AFTER IMPERMISSIBLY FINDING HIM VESTED WITH ABSOLUTE IMMUNITY WITH RESPECT TO CERTAIN EXTRAJUDICIAL ACTIONS.

The Fourth Circuit, in finding defendant Payne to be absolutely immune for two of many allegations of his wrongful conduct set forth in the complaint, stated that "as to his alleged actions in conspiring with police officers to present false testimony and for withholding exculpatory evidence prior to trial, Defendant Payne was entitled to absolute immunity." (App. A at 12a). This decision is clearly wrong at least on the grounds that Payne has the burden of showing that absolute immunity is justified for the function in question. *Burns v. Reed*, 500 US. 478 (1991). Moreover, the decision probably violates this Court's ruling in *Buckley v.*

Fitzsimmons, 509 U.S. 259 (1993) in which this Court found the prosecutors to have qualified immunity *only* for allegedly fabricating evidence during the preliminary investigation of a crime and making false statements at a press conference announcing the return of an indictment, denying them absolute immunity because those acts were not functions sufficiently involved in the prosecution process so as to invoke the protection intended by absolute immunity.

The Fourth Circuit recognized the authority of those two decisions of this Court in its own decision in *Carter v. Burch*, 34 F.2d 257 (1994) which was its basis for granting Payne absolute immunity. At issue in that case was the §1983 liability of Burch, the Commonwealth's Attorney, for withholding exculpatory evidence before and after Carter's criminal trial and conspiring to present false testimony at trial. In upholding absolute immunity for those acts, the Fourth Circuit nonetheless recognized that absolute immunity is lost and qualified immunity is the only defense available to the prosecutor who performs actions "not intimately associated with the judicial process." *Carter*, Ibid. The Fourth Circuit did recognize that the prosecutor in *Burns v. Reed*, supra., was absolutely immune for his participation in a probable cause hearing but not for giving advice to the police. Applying these standards to Payne's conduct shows that although he *may* be protected by absolute immunity for the actual suborning of McCarthy's and Bridgwater's perjury at the August 2nd trial, he is still protected only by qualified immunity for advising McCarthy to arrest the Smiths on fabricated charges, for

"creating" a fabricated version of the facts so as to assure the Smiths' convictions, for advising one or more of the defendant sheriffs to delete, alter or enlarge dispatch records and for authoring or directing McCarthy to author the entire "Confidential Supplement." The allegations of the complaint clearly show that Payne from the very start orchestrated a fixed trial designed to convict Donna Smith so as to defeat her claim for personal injuries. Surely, absolute immunity cannot possibly be justified for that function.

Finally, all of Payne's conduct, since being first contacted in February of 2007 about the Smiths' claims of perjury and conspiracy and continuing to this very day, has no connection whatsoever, much less any intimate association with the judicial process. *Burch v. Carter*, supra. In short, Payne advised, presided over, administered and corrupted the entire criminal process begun immediately after McCarthy's malicious wounding of Donna Smith and continuing to the present. He should be required to respond to discovery and rely during the trial on a defense of qualified immunity, the only defense available to him under the law for his actions.

The Fourth Circuit did respect somewhat those Supreme Court decisions when it conceded that with "regard to their assertions relating to Defendant Payne's advising the officer to arrest them on fabricated charges, the Smiths correctly argue that such an action by Payne would be entitled only to qualified, not absolute, immunity." (App. A at 12a). However, if that is in fact the Fourth Circuit's ruling, then it should have remanded to district

court for trial. Instead, the Fourth Circuit disingenuously claims, in another attempt to extricate Payne from his predicament, that the district court properly dismissed the Smiths' claims against Payne, stating that "as the district court found, there is no specific allegation in the complaint that Payne knew about, gave advice regarding or otherwise participated in the arrest and search, [then] even if the Smiths' assertions with regard to Defendant Payne's actions relative to their search and arrest on February 16, 2006, were properly pled and not wholly conclusory, such claims would be barred by the applicable two-year statute of limitations." (App. A at 12a).

As stated above in Argument II, the Fourth Circuit only *seems* to have applied the statute of limitations with respect to the sheriff respondents appropriately by clearly clarifying the district court ruling and separating the actions of actions of the state officers before, and those after, the malicious wounding of Donna Smith. If so, since all Payne's known actions in orchestrating the prosecution conspiracy at this time occurred after the malicious wounding and concluded with the August 2nd conviction, the claims against him are emphatically not barred by the statute of limitations.

V. REVIEW IS WARRANTED BECAUSE THE FOURTH CIRCUIT FINDS THE STATE RESPONDENTS TO BE VESTED WITH QUALIFIED IMMUNITY AND, WITH RESPECT TO MCDONNELL AND DION, FINDS THEM VESTED WITH ABSOLUTE IMMUNITY, SUCH FINDINGS IN CONFLICT WITH MULTIPLE

DECISIONS OF THE UNITED STATES SUPREME COURT, INCLUDING BUT NOT LIMITED TO, *MONELL V. NEW YORK CITY DEPT. OF SOCIAL SERVICES*, 436 U.S. 658 (1978), *PEMBUAR V. CITY OF CINCINNATI*, 475 U.S. 469 (1986), *CITY OF ST. LOUIS V. PRAPROTNIK*, 485 U.S. 112 (1988) AND *OWEN V. CITY OF INDEPENDENCE*, 445 U.S. 622 (1980).

Both the Fourth Circuit and the district court, in dismissing petitioners' complaint against the state respondents by finding them to be vested with qualified immunity and in the case of the Fourth Circuit, finding respondents McDonnell and Dion to be additionally vested with absolute immunity, *completely relied* on their characterization of the Smiths' claims to have, in the words of the district court, "a constitutional right to have their allegations of perjury investigated and subsequently prosecuted" (App. B at 41a) and in the words of the Fourth Circuit, a right "to a criminal investigation or criminal investigation of another." (App. A at 13a). These are abso'utely correct statements of the law but the only problem is that they have no application to the case before this court. The Smiths have maintained throughout this litigation that the gravamen of their complaint against the state respondents is that they ratified, condoned and/or acquiesced in the prosecution conspiracy and that perjury was just one of many means listed in paragraph 30 of the complaint employed to attain the objective of the conspiracy which was the conviction of the Smiths. (App. A at 79a).

Both courts' total reliance on their characterization of the Smiths' claims, however fatally flawed, enabled both to avoid finding, in the face of overwhelming evidence, that all the state respondents ratified, condoned and/or acquiesced in the prosecution conspiracy. There is little doubt that all state respondents may be held personally liable under §1983 based upon actions taken in their official capacity, *Hafer v. Melo*, 502 U.S. 21 (1991), and the present case is no exception. Viewing the facts of the complaint in the light most favorable to the Smiths, it may reasonably be assumed that Dion, the Assistant Attorney General representing for the Virginia State Police, was immediately consulted and copied with Tyler's initial mailing to Payne and the State Police in February, 2007. This would be a natural reaction to the mailing and standard operating procedure instituted upon receipt of such a package of information supporting very serious accusation. Dion would presumably advise Rader from that point on, consulting with McDonnell as required. Rader became the conduit of the Attorney General's policy to Payne on the assumption that Dion and McDonnell never spoke directly with Payne. *If* that was the case, then by the time Rader comes up to Tyler's office to ascertain Tyler's future intentions (App. C at 96a), the decision to establish an official policy of denial and stonewalling had already been made by the office of the Attorney General. Payne would surely go along with that policy and subsequent events confirm it. Accordingly, it is *extremely* likely that respondents Dion and McDonnell were expecting Tyler's December 12, 2007, mailing, and had already prepared their response, the "without authority"

letter of January 14, 2008, mailed to Tyler. In sum, it is wholly reasonable to assume that all state respondents, excepting Kaine, had full knowledge of the corrupt August 2nd trial from March 21, 2007, until present. Respondent Kaine presents a different situation. Although discovery may have revealed that he was informed about Tyler's initial package at its time of its arrival in Appomatox, it is more likely, viewing the complaint in the light most favorable to the Smiths as to him, that his first knowledge of the corrupt trial came with Tyler's December 12, 2007, which he received on December 14, 2007.

For purposes of argument, however, let us assume, that Rader, having already ratified and actually joined the prosecution conspiracy, and Payne were acting alone from February, 2007, and, as unlikely as it may be, that respondents Dion, McDonnell, along with Kaine, were *first* notified of the Smiths' situation when they received the December 12th package from Tyler on December 14, 2007. The duties of Dion, as counsel for the Virginia State police, and McDonnell and Kaine, as the two top law enforcement officials in Virginia, when they received what was overwhelming evidence of local and state police corruption, are defined by state law. And at the outset, it cannot be stressed enough that Dion's statement made to Tyler in her January letter, so blindly accepted by both courts, to the effect that McDonnell and Kaine were "without authority to act" was and remains palpably false. (App. C at 103a). In fact, the authority of the Attorney General and the ultimate authority of defendant Kaine over criminal matters was and

remains clearly delineated in §2.2-511 of the Code of Virginia.

The duty to correct the effects of that corrupt trial of August 2, 2006, flowed not only from §2.2-511 of the Code of Virginia (1950) but also from the oaths all took before assuming office and the additional oaths taken by the lawyer respondents (Kaine included) under the Code of Professional Responsibility. Also, the failure of McDonnell and Kaine to correct the effects of the corrupt trial and its felonious participants could very well (and sadly) constitute "malfeasance in office, corruption, neglect of duty, or other high crime or misdemeanor...offending against the Commonwealth" within the meaning of the impeachable conduct set forth in §17 of Article IV of the Constitution of Virginia, which is another source of state law establishing the respondents' duties. Obviously, if they had conscientiously performed their duties required by their oaths of office and the Virginia Constitution, as well as §2.2-511 of the Code of Virginia (1950), as alleged in Paragraph 38 of the complaint, the corrupt trial and its supporting actors would have been exposed, the conspiracy undone, and Donna Smith's conviction vacated. (App. C at 82a).

Obviously, McDonnell and Kaine purposely ignored the provisions of §2.2-511 but had they done their duty under Virginia law, the procedure would have gone along these lines. On the assumption that McDonnell and Dion would be unable to obtain the concurrence of respondent Payne for an intervention, all McDonnell had to do to fulfill his duty was to call

the Governor, review the situation with him, give him his opinion and ask the Governor to request an investigation, which would engage the gubernatorial "override" language set forth in the very first sentence §2.2-511 of the Code of Virginia (1950), to wit: "Unless specifically requested by the Governor to do so, the Attorney General shall have no authority to institute or conduct criminal prosecutions...." The same reasoning applies in reverse to Kaine's duty when he received the Tyler mailing. All he had to do, after he investigated the situation with his staff, was to contact McDonnell, confirm the bona fides of the mailing and invoke the same gubernatorial "override" language. By failing to do so, he ratified and condoned the policy of denial and stonewalling which Rader, (and presumably Dion and McDonnell) had already jointly established with Payne.

Regardless of who knew what and when she or he knew it, there is no doubt that the state respondents *did* establish a state policy with respect to the corruption "package" which was delivered to them, whether in February or December of 2007. And irrespective of whether or not that policy continues on a recurring basis (probable), or is a single act (doubtful) of governmental policy, the undeniable fact of the matter is that it *is* a governmental policy "tailored to a particular situation" and more than sufficient to invoke the liability of all state respondents by way of ratification, condemnation, acquiescence or reckless disregard of the Smiths' civil rights, unless they win the day with a jury which has received an instruction on qualified immunity. *City of St. Louis*

v. Praprotnik, 485 U.S. 112 (1988); Owen v. City of Independence, 445 U.S. 622 (1980). Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978); *Pembuar v. City of Cincinnati*, 475 U.S. 469 (1986).

In closing, let it be known, let it be made crystal clear, and let it be undeniable, that what was received by Payne, Rader, Dion, McDonnell and Kaine, whenever it was received, emphatically contained no *allegation* of perjury and corruption. What each received, and failed miserably to respond to, was *proven perjury and corruption*. If this Court allows even one of the respondents to escape liability, then the conclusion is inescapable that it will be lawful for any Commonwealth's Attorney in the Western District of Virginia, any prosecutor in the Fourth Circuit, or for that matter, any prosecutor in the United States of America, to protect a criminal police officer and his jurisdiction from the personal injury claims of a victim of that officer's felony simply by orchestrating a conviction of that innocent victim.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

Bruce Karl Tyler
ATTORNEY AT LAW
Post Office Box 2
129 Afton Depot Lane
Afton, VA 22920-0002
(540) 943-0932
aftonlaw@cfw.com

No. _____

In The
Supreme Court of the United States

DON W. SMITH AND DONNA L. SMITH,
Petitioners,

v.

MICHAEL R. MCCARTHY,
IN HIS INDIVIDUAL CAPACITY AND IN HIS CAPACITY AS A NELSON COUNTY DEPUTY SHERIFF, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

APPENDIX

Bruce Karl Tyler
ATTORNEY AT LAW
Post Office Box 2
129 Afton Depot Lane
Afton, Virginia 22920-0002
(540) 943-0932
aftonlaw@cfw.net

Counsel of Record for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

APPENDIX A--OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED OCTOBER 28, 2009 and the ORDER ON REHEARING ENTERED JANUARY 22, 2010

DON W. SMITH; DONNA L. SMITH,
Plaintiffs - Appellants,

v.

MICHAEL R. MCCARTHY, in his individual capacity and in his capacity as a Nelson County Deputy Sheriff; MALCOLM E. BRIDGWATER, in his individual capacity and in his capacity as a Nelson County Deputy Sheriff; JOHN M. DIXON, II, in his individual capacity and in his capacity as a past Nelson County Deputy Sheriff; GARY L. BRANTLEY, in his individual capacity and in his past capacity as Nelson County Sheriff; PHILLIP D. PAYNE, IV, in his individual capacity and in his capacity as Nelson County Commonwealth's Attorney; JOSEPH L. RADER, in his individual capacity as a Virginia State Police Lieutenant; SHANNON Y. DION, in her capacity as a Virginia Assistant Attorney General; ROBERT F. MCDONNELL, in his individual capacity and in his capacity as the Attorney General of the Commonwealth of Virginia; TIMOTHY M. KAINE, in his individual capacity and in his capacity as Governor of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA, by and through her duly established Department of State Police; UNKNOWN DEFENDANTS, in their individual capacities and in their capacities as employees of the Virginia State Police, the Attorney General and/or

the Governor; VIRGINIA DEPARTMENT OF STATE POLICE,

Defendants - Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. Norman K. Moon, District Judge. (3:08-cv-00036-nkm-bwc)

Submitted: September 30, 2009 Decided: October 28, 2009

Before NIEMEYER, KING, and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Bruce Karl Tyler, Afton, Virginia, for Appellants. William C. Mims, Attorney General, Maureen Riley Matsen, Deputy Attorney General, C. Nicole Gilliam, Assistant Attorney General, Richmond, Virginia; James M. Bowling, IV, ST. JOHN, BOWLING, LAWRENCE & QUAGLIANA, LLP, Charlottesville, Virginia; Rosalie Pemberton Fessier, TIMBERLAKE, SMITH, THOMAS & MOSES, P.C., Staunton, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Don W. Smith and Donna L. Smith ("the Smiths") appeal the district court's dismissal of their

civil rights action filed pursuant to 42 U.S.C. §§ 1981, 1983, and 1985 (2006), seeking monetary damages[1] for alleged constitutional violations which arose on February 16, 2006, and thereafter. In addition to naming "unknown defendants," the Smiths named eleven specific Defendants.[2] On appeal, they claim: (1) the district court applied the incorrect standard of review in considering the Defendants' motions to dismiss and dismissing the Smiths' complaint; (2) the district court erred in dismissing their claims against Defendants McCarthy and Bridgwater as barred by the applicable two-year statute of limitations; (3) the district court erred in its dismissal of Defendants McCarthy, Bridgwater, Dixon, and Brantley based on qualified immunity; (4) the district court erred in dismissing Defendant Payne on the basis of absolute immunity; (5) the district court erred in its dismissal of Defendants Rader, Dion, McDonnell, and Kaine based on qualified immunity; and (6) that all Defendants should be prohibited from basing any defense on Donna Smith's obstruction of justice conviction. For the reasons set forth below, we affirm.

The allegations forming the basis of the complaint arose from an incident on February 16, 2006, wherein Deputies McCarthy and Bridgwater of the Nelson County Sheriff's Department went to the Smiths' property to serve a capias on Donna Smith's son, David Reier, for his arrest. The deputies, who were following up on reports that Reier had been seen in the area driving a green Dodge pickup truck, found a green Dodge pickup truck parked next to the house. While McCarthy and Bridgwater were

present, Donna and Don Smith returned to the property in separate vehicles.

Deputy McCarthy questioned Donna Smith about the whereabouts of her son and then attempted to look into the back of Donna Smith's van. The complaint alleged that when McCarthy attempted to look into the van, Donna Smith "maneuvered her body so as to place the same between McCarthy and the van's door with her back to McCarthy and her arms spread-eagled across the side of the van in a protective position." A physical altercation ensued.

During the struggle, Don Smith attempted to physically intervene, citing concern for his wife's heart condition. Immediately following the altercation, both Donna and Don Smith were arrested for obstruction of justice. Soon thereafter, Deputy Dixon and Sheriff Brantley arrived on the scene. The complaint alleged that after the arrest, Bridgwater, McCarthy, Dixon, and Brantley spoke together out of the earshot of the Smiths and at times appeared to speak on cell phones.

At their trial on the obstruction of justice charges, the Smiths alleged that McCarthy and Bridgwater provided false testimony; they also suggested that dispatch records related to the incident were suspect. Although Don Smith was

acquitted, Donna Smith was convicted of obstruction of justice — a conviction which she did not appeal.

Following the trial on the obstruction of justice charges, the Smiths' lawyer, Bruce K. Tyler, reported to Defendant Payne, Nelson County Commonwealth's Attorney, the alleged fraud on the tribunal of the cover-up-conspiracy and the commission of perjury by Defendants McCarthy and Bridgwater. By letter dated July 23, 2007, Payne and Rader, of the Virginia State Police, communicated to Tyler their determination that no perjury or conspiracy had occurred. Tyler then referred the matter to Defendants Kaine and McDonnell, to no ultimate avail. Tyler received a letter dated January 14, 2008, from Defendant Dion stating that because Payne and the Virginia State Police determined that "no prosecution should be initiated," the Office of the Attorney General was "without authority to act." The Smiths' complaint alleged violations of their rights based upon the foregoing events.3

The Defendants filed motions to dismiss the complaint on the basis of, inter alia, qualified, absolute, and Eleventh Amendment immunity and the statute of limitations. Following oral argument on the motions to dismiss, the district court granted all Defendants' motions as to liability in their official capacities based on Eleventh Amendment immunity; dismissed Defendant Payne from the suit in his individual capacity, finding him to be absolutely immune; dismissed Defendants McCarthy, Bridgwater, Dixon, and Brantley from the suit in their individual capacities, finding them to have qualified immunity and finding no constitutional violations; dismissed Defendants Rader, Dion, McDonnell, and Kaine from the suit in their individual capacities, finding them to have qualified

immunity and/or no personal involvement; and granted the motions to dismiss Defendants Department of State Police and Commonwealth of Virginia on grounds of Eleventh Amendment immunity. The trial court also found that any claims relating to the events of February 16, 2006, including, but not limited to, excessive force, violation of the Smiths' due process rights, illegal entry upon the Smiths' property, and illegal search and seizure, were barred by the applicable two-year statute of limitation. The Smiths timely appealed.[4]

As a preliminary matter, this court reviews the district court's grant of a motion to dismiss pursuant to either Fed. R. Civ. P. 12(b)(1) or Fed. R. Civ. P. 12(b)(6) under a de novo standard of review. Duckworth v. State Admin. Bd. of Election Laws, 332 F.3d 769, 772 (4th Cir. 2003) (Rule 12(b)(6) motions); Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999) (Rule 12(b)(1) motions). When this court reviews a district court's Rule 12(b)(6) dismissal, it focuses only on the legal sufficiency of the complaint. Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008). "[W]hen ruling on a defendant's motion to dismiss, a [trial] judge must accept as true all of the factual allegations contained in the complaint." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (citations omitted). However, to survive a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level," with the complaint having "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions" and "[t]hreadbare

recitals of the elements of a cause of action, supported by mere conclusory statements," are insufficient. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 555). A complaint may survive a motion to dismiss only if it "states a plausible claim for relief' that "permit[s] the court to infer more than the mere possibility of misconduct" based upon "its judicial experience and common sense." Id. at 1950 (citing Twombly, 550 U.S. at 556).

Appellants' first claim of error is that the district court applied the wrong standard in ruling upon Defendants' motions to dismiss. They claim the district court failed to assume the truth of the Smiths' complaint and to construe the complaint in the light most favorable to them. They specifically allege error in the district court's reliance on the transcript of the obstruction of justice trial in rendering its decision.

In considering motions to dismiss under Rule 12(b)(6), the court may properly consider exhibits attached to the complaint. Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1465 (4th Cir. 1991). Here, as noted above, the Smiths cited to the trial transcript in their complaint, and their counsel filed a copy of the transcript with the trial court, citing his intention to rely upon it in argument on the motions to dismiss. As such, they cannot now justifiably complain about the trial court's consideration of the transcript in rendering its decision or on its reliance on the facts as determined in that proceeding. We have reviewed carefully the record and find no merit to the Smiths' claim that

the district court applied the incorrect standard in considering either the trial transcript or the motions to dismiss or in dismissing the Smiths' complaint.

The Smiths next claim reversible error by the district court in dismissing their claims against Defendants McCarthy and Bridgwater as barred by the applicable two-year statute of limitations.[5] They claim that because the complaint alleges a conspiracy to convict them, any events occurring after the actual alleged malicious wounding of Donna Smith on February 16, 2006, are not barred by the statute of limitations because all such illegal acts were in furtherance of the conspiracy. Thus, they argue, the two-year limitations period began when the objective of the conspiracy was attained, which, they reason, would be on August 2, 2006, the date Donna Smith was convicted.[6]

The accrual of a cause of action under § 1983 for statute of limitations purposes is based on federal law. Nasim v. Warden, Md. House of Corr., 64 F.3d 951, 955 (4th Cir. 1995) (en banc); see also Wallace v. Kato, 549 U.S. 384, 388 (2007). This court has held that the cause of action under § 1983 accrues "when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action." Nasim, 64 F.3d at 955.

Here, the specific claims dismissed by the district court as barred by the statute of limitations were those "claims regarding the events of February 16, 2006 – excessive force, violations of Plaintiffs' due process rights, illegal entry upon Plaintiffs' property, illegal search and seizure, etc." The district court did not include the Smiths' conspiracy claims

in its dismissal on statute of limitations grounds, but rather those claims relating solely to the events of February 16, 2006. Thus, to the extent the Smiths sought to raise claims in their August 1, 2008, complaint expressly relating to the events of February 16, 2006, the district court correctly dismissed such claims as barred by the statute of limitations.[7]

The Smiths next contend that the district court erred in finding that the actions of Defendants McCarthy, Bridgwater, Dixon, and Brantley were protected by qualified immunity. They claim on appeal that McCarthy had no right to "be vested with qualified immunity for committing an extremely serious felony that could have killed or seriously injured Donna Smith who had a heart condition" and that Bridgwater had a constitutional duty to arrest McCarthy and "to refrain from aiding in the arrest of [the Smiths]." Moreover, they contend that Dixon and Brantley likewise failed in their duty to free the Smiths and that, in so failing, the officers joined in the conspiracy to convict the Smiths. The Smiths further claim that these Defendants continued their illegal conspiracy when they fixed their testimony prior to trial, knew that records had been altered, and/or knew that Bridgwater and McCarthy were going to perjure themselves at the trial, all in an effort to fabricate the criminalization of Donna Smith.[8]

Qualified immunity protects government officials performing discretionary functions from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The court must determine "whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, . . . whether that right was clearly established at the time of the alleged violation." Conn v. Gabbert, 526 U.S. 286, 290 (1999); see also Pearson v. Callahan, 555 U.S. __, 129 S. Ct. 808, 815-16 (2009). For a right to be clearly established, "its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Hope v. Pelzer, 536 U.S. 730, 739 (2002) (internal quotation marks omitted).

We find the district court did not engage in improper fact-finding, or otherwise err, in determining that the officers were entitled to qualified immunity because the Smiths failed to allege a meeting of the minds, a necessary element of a conspiracy, and because the allegations of conspiracy were conclusory. The allegations in the Smiths' complaint describe that, at the time of arrest, these Defendants "conferred at times as an entire group and at times in smaller groups out of earshot of plaintiffs and appeared at times to be talking on cell phones." These facts, taken as true, do not establish a meeting of the minds among the officers to violate the rights of the Smiths. As the district court properly held, this claim is wholly conclusory and devoid of sufficient allegation of a meeting of the minds. The other similarly conclusory claims, including the failure of the other officers to arrest McCarthy,[9] likewise fail to establish a conspiracy.[10]

As the district court held, the Smiths' claim that the officers' testimony was "fixed and coordinated" prior to trial related to the issue of whether the officers had cause to be on the Smiths' property on February 16, 2006. As the search of the property is analyzed from an objective perspective, and as the law enforcement officers clearly had the objective right to go on the Smiths' property to inquire about the green Dodge pickup truck and the possibility that Reier was present on the premises, no constitutional deprivation was viably asserted by the Smiths. See Brigham City, Utah v. Stuart, 547 U.S. 398, 404-05 (2006); see also United States v. Bradshaw, 490 F.2d 1097, 1100 (4th Cir. 1974).

Accordingly, the court did not err in finding that the Smiths failed to assert any violation of a clearly established constitutional right, such that Defendants McCarthy, Bridgwater, Dixon, and Brantley would not be entitled to qualified immunity. The district court's dismissal of these Defendants based on qualified immunity is affirmed.[11]

The Smiths' next claim of error is in the district court's dismissal of Defendant Payne on the basis of absolute immunity. They assert that Payne was not protected by absolute immunity because he "extrajudicially" conspired and advised the police officers to arrest the Smiths on fabricated charges, to alter the dispatch records, and to present false testimony at the Smiths' criminal trial, and because he allegedly withheld exculpatory evidence.

In Imbler v. Pachtman, the Supreme Court held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." 424 U.S. 409, 431 (1976). This court has held that a state prosecuting attorney is absolutely immune from liability for damages for conspiring with police officers to present false testimony and for withholding exculpatory evidence prior to trial, as those actions are "intimately associated with the judicial process." Carter v. Burch, 34 F.3d 257, 262-63 (4th Cir. 1994). Thus, as to his alleged actions in conspiring with police officers to present false

testimony and for withholding exculpatory evidence prior to trial, Defendant Payne was entitled to absolute immunity. Id. at 263.

With regard to their assertions relating to Defendant Payne's advising the officers to arrest them on fabricated charges, the Smiths correctly argue that such an action by Payne would be entitled only to qualified, not absolute, immunity. See Burns v. Reed, 500 U.S. 478, 492-96 (1991). However, as the district court found, there is no specific allegation in the complaint that Payne knew about, gave advice regarding, or otherwise participated in the arrest and search. Moreover, even if the Smiths' assertions with regard to Defendant Payne's actions relative to their search and arrest on February 16, 2006, were properly pled and not wholly conclusory, such claims would be barred by the applicable two-year statute of limitations. Hence, the district court properly dismissed the Smiths' claims against Defendant Payne.

In their next two arguments, the Smiths contend that the district court erred in dismissing their case against Defendants Rader, Dion, McDonnell, and Kaine (the "State Defendants") based on qualified immunity. The claims against the State Defendants are based on the Smiths' attorney's request to Governor Kaine and then-Attorney General McDonnell to investigate whether the deputies testified untruthfully and his further request for the referral of the matter to a special prosecutor, together with Assistant Attorney General Dion's statement to the Smiths' attorney that the Attorney General's Office was without authority to act on his request.

In this case, because the Smiths had no right[12] to a criminal investigation or criminal prosecution of another, see Sattler v. Johnson, 857 F.2d 224, 227 (4th Cir. 1988), the district court properly determined that they failed to allege the violation of a clearly established statutory or constitutional right. See Harlow, 457 U.S. at 818. Thus, the district court correctly held that the individual State Defendants were entitled to qualified immunity. Moreover, based on absolute prosecutorial immunity, former Attorney General McDonnell and Assistant Attorney General Dion cannot be sued in any event for their decision not to prosecute the officers. See Imbler, 424 U.S. at 431.[13, 14]

The Smiths' final claim is that the Defendants should be precluded from basing any defense on Donna Smith's obstruction of justice conviction. As this issue was not raised before the district court, we

decline to consider it on appeal. See Muth v. United States, 1 F.3d 246, 250 (4th Cir. 1993).

Accordingly, we affirm the district court's dismissal of the Smiths' complaint. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

FOOTNOTES

[1] They sought $500,000 in compensatory damages, $30,000,000 in punitive damages, and attorney's fees and costs.

[2] Specifically, the Smiths filed suit against Michael R. McCarthy, in his individual capacity and in his capacity as a Nelson County Deputy Sheriff; Malcome E. Bridgwater, in his individual capacity and in his capacity as a Nelson County Deputy Sheriff; John M. Dixon, II, in his individual capacity and in his past capacity as a Nelson County Deputy Sheriff; Gary L. Brantley, in his individual capacity and in his past capacity as a Nelson County Sheriff; Phillip D. Payne, IV, in his individual capacity and in his capacity as Nelson County Commonwealth's Attorney; Joseph L. Rader, in his individual capacity as Virginia State Police Lieutenant; Shannon Y. Dion, in her capacity as a Virginia Assistant Attorney General; Robert F. McDonnell, in his individual capacity and in his capacity as the Attorney General of the Commonwealth of Virginia; Timothy M. Kaine, in his individual capacity and in his capacity as Governor of the Commonwealth of Virginia; the Commonwealth of Virginia, by and through her duly established Department of State Police; unknown defendants, in their individual capacities and in their capacities as employees of the Virginia State Police, the

Attorney General, and/or the Governor; and the Virginia Department of State Police.

[3] Having cited to the trial transcript in the complaint, the Smiths' counsel also filed a notice of hearing in which he attached a copy of the transcript of the obstruction of justice misdemeanor trial. Counsel indicated that during oral argument he intended to rely upon the transcript in responding to Defendants' motions to dismiss.

[4] The Smiths have not appealed that portion of the trial court's Order dismissing the 42 U.S.C. § 1981 and § 1985 claims and dismissing the claims of monetary relief against Defendant Payne in his official capacity based on Eleventh Amendment immunity.

[5] Virginia's personal injury statute of limitations is two years. Va. Code Ann. § 8.01-243(A).

[6] The Complaint was filed on August 1, 2008.

[7] Moreover, to the extent the Smiths claim false arrest, such claim is likewise barred by the statute of limitations. See Wallace, 549 U.S. at 388.

[8] The Smiths include Defendant Payne in this allegation, asserting on appeal that he was "advising the sheriff defendants what to do [to cover up the malicious wounding and propagate the conviction of Donna Smith for obstruction of justice]."

[9] To the extent this claim is raised for the first time on appeal, we decline to review it. Muth v. United States, 1 F.3d 246, 250 (4th Cir. 1993).

[10] With regard to the Smiths' claim that Bridgwater and McCarthy presented perjured testimony at their trial, the district court correctly held that such claim is subject to dismissal because the Supreme Court has specifically held that police officers are immune from an action arising under § 1983 for alleged perjury. See Briscoe v. LaHue, 460 U.S.

325, 342- 43, 345 (1983). Likewise, their claim that the Defendants failed to provide them with allegedly "exculpatory" evidence before trial (even assuming, arguendo, that the evidence to which the Smiths refer is properly categorized as "exculpatory") was properly dismissed by the district court. See Jean v. Collins, 221 F.3d 656, 663 (4th Cir. 2000).

[11] Similarly, the district court did not err in dismissing the Smiths' claims against any of the officials in their official capacities, as they are afforded immunity by the Eleventh Amendment. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989).

[12] Nor do private citizens have standing to request the prosecution of another. Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).

[13] As noted above as to Defendants McCarthy, Bridgwater, Dixon, and Brantley, there was no error in the district court's dismissal of the Smiths' claims against the State Defendants in their official capacities, as they also are afforded immunity by the Eleventh Amendment. See Will, 491 U.S. at 71.

[14] While not set forth in a separate argument in their brief, the Smiths also argue that the district court erred in dismissing their claims against the Commonwealth of Virginia and the Virginia State Police. This claim has no merit. See Will, 491 U.S. at 64, 71; see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977).

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NO. 09-6200
(3:08-cv-00036-nkm-bwc)

FILED: January 22, 2010

DON W. SMITH; DONNA L. SMITH,
Plaintiffs - Appellants,

v.

MICHAEL R. MCCARTHY, in his individual capacity and in his capacity as a Nelson County Deputy Sheriff; MALCOLM E. BRIDGWATER, in his individual capacity and in his capacity as a Nelson County Deputy Sheriff; JOHN M. DIXON, II, in his individual capacity and in his capacity as a past Nelson County Deputy Sheriff; GARY L. BRANTLEY, in his individual capacity and in his past capacity as Nelson County Sheriff; PHILLIP D. PAYNE, IV, in his individual capacity and in his capacity as Nelson County Commonwealth's Attorney; JOSEPH L. RADER, in his individual capacity as a Virginia State Police Lieutenant; SHANNON Y. DION, in her capacity as a Virginia Assistant Attorney General; ROBERT F. MCDONNELL, in his individual capacity and in his capacity as the Attorney General of the Commonwealth of Virginia; TIMOTHY M. KAINE, in his individual capacity and in his capacity as Governor of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA, by and through her duly established Department of State Police;

UNKNOWN DEFENDANTS, in their individual capacities and in their capacities as employees of the Virginia State Police, the Attorney General and/or the Governor; VIRGINIA DEPARTMENT OF STATE POLICE,

Defendants - Appellees.

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Niemeyer, Judge King and Judge Shedd

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX B--MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA DATED AND DECIDED JANUARY 7, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

DON W. SMITH
AND
DONNA L. SMITH,
Plaintiffs,

v.

CIVIL ACTION NO. 3:08cv00036

MEMORANDUM OPINION
JUDGE NORMAN K. MOON

MICHAEL R. MCCARTHY, ET AL.,
Defendants.

By counsel, Mr. Don W. Smith and Mrs. Donna L. Smith ("Plaintiffs"), husband and wife, filed the instant Complaint alleging violations of their civil rights "under the Constitution of the United States, particularly the Fourth, fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States and under federal law, including without limitation, sections 1981, 1983, and 1985 of title 42 of the United States Code." In addition to naming "UNKNOWN DEFENDANTS," Plaintiffs have named ten specific Defendants.[1] Plaintiffs seek, *inter alia*, "FIVE HUNDRED THOUSAND

DOLLARS ($500,000) as compensatory damages," "THIRTY MILLION DOLLARS ($30,000,000) as punitive damages," and "an award of attorney fees

and costs of suit." The matter is not before the court upon consideration of the Complaint, Defendants' Motions to Dismiss, Plaintiffs' response to the Motions to Dismiss, and the parties' arguments regarding the Motions to Dismiss, presented by counsel at a hearing on December 19, 2008. For the reasons stated herein, I will grant the Motions to Dismiss.

I. FACTUAL BACKGROUND[2]

On February 16, 2006, Nelson County Sheriff's Department Deputies McCarthy and Bridgewater[3] went to Plaintiffs' property to determine whether David Reier, Mrs. Smith's son and Mr. Smith's stepson, was present there, the Sheriff's Department having received a warrant for Reier's arrest from Baltimore County, Maryland; additionally, Louisa County, Virginia, had issued a *capias* for Reier's arrest. On the morning of February 16, 2006, following up on reports that Reier had been seen in the area driving a green Dodge pickup truck, the deputies traveled in separate vehicles to the Smiths' property. The deputies, at least one of whom had some superficial familiarity with the property at the Smiths' address, drove up the driveway to what appeared to be the main residence on the Smith's property, parked in the driveway, and knocked on the door, but obtained no response. As the deputies began to drive from the property, they observed from the driveway a green Dodge pickup truck parked behind a cabin elsewhere on the property.[4] The deputies parked their vehicles and, attempting to determine whether anyone was present, the deputies investaged the truck, several

othe runoccupied vehicles, and an unlocked or open "camper trailer." The deputies knocked upon the door to the cabin but received no answer, and maintained that the found the cabin locked. Evidently the green Dodge pickup truck was unlocked, and Deputy McCarthy later testified that he "found papers in the truck that indicated [that Reier] owned the truck." According to Plaintiffs, the truck had borne a Maryland license plate; according to the deputies, the green Dodge pickup truck bore no license plate on February 16, 2006. Through an approximately inch-and-a-half space beneath a door, the deputies detected movement inside the cabin; because of this, Deputy Bridgewater placed a cell phone call to Captain Dixon to initiate the process for obtaining a seach warrant.

The deputies observed Mrs. Smith approaching in a van. Mrs. Smith drove to the point where one of the deputies' vehicles blocked further ingress, parked her van, and, after some discussion with Deputy McCarthy, got out of the van. Soon after Mrs. Smith arrived in the van, Mr. Smith approached in a separate vehicle. Deputy McCarthy informed Mrs. Smith that they were looking for her son, who was a fugitive, and inquired if she knew where he was. Mrs Smith stated that she did not know her son's whereabouts, and a combative discussion ensued. Mrs. Smith declined to consent to a search of the cabin. Mrs. Smith was informed that a search warrant was being obtained and that, although she could leave, she could not go into the cabin until the deputies had searched the house. When told that the cabin doors were locked, Mrs. Smith insisted that they could not be locked, because

the Smiths had no keys t the doors and thus did not lock them.

Mrs. Smith also declined to consent to a search of her van; according to McCarthy, an object that appeared to be a rolled-up carpet, large enough to hide a person, was lying in the back of the van. When McCarthy attempted to have a closer look into the van through its window,[5] Mrs. Smith attempted to physically prevent McCarthy from viewing the inside of the van. An altercation ensued between McCarthy and mrs. Smith, and McCarthy subdued Mrs. Smith. At some point during the encounter between Mrs. Smith and Deputy McCarthy, Mr. Smith exited his vehicle. During the struggle, Mrs. Smith approached and, in an attempt to intervene, either grabbed McCarthy's shirt or placed a hand on McCarthy's shoulder. Deputy Bridgewater then approached with his handgun drawn, subdued Mr. Smith (who was apparently cooperative when confronted with the drawn handgun), and McCarthy eventually secured Mr. Smith with handcuffs, after having handcuffed Mrs. Smith. Thereafter, Sheriff Brantley arrived with Captain Dixon. The Smiths then consented to a search of the cabin. Although the deputies stated that they had earlier found the cabin locked, the cabin was found to be unlocked when the Smiths consented to the search, and the Smiths reiterated that they had not locked the doors because they had no keys to open the locks. David Reier was not in the cabin; according to Deputy Bridgewater, fresh footprints in the mud behind the cabin and the unlocked doors suggested that Reier had escaped while Mrs. Smith diverted the deputies' attention.

Subsequent to this encounter, McCarthy issued a summons for the arrest of Mr. and Mrs. Smith for obstruction of justice. On August 2, 2006, in the General District Court of the County of Nelson ("Nelson GDC"), Mrs. Smith was convicted of the misdemeanor charge of obstruction of justice, but the charge against Mr. Smith was dismissed. mrs. Smith was fined $250.00 and given a suspended sentence of thirty days in jail.[6] According to the instant complaint, Mrs. Smith "declined" to lodge a timely appeal to her conviction.

By letters dated February 27, 2007, and march 22, 2007, long after the time to note an appeal of Mrs. Smith's conviction, Plaintiffs' counsel requested that Defendant Phillip D. Payne, IV (the Nelson County Commonwealth's Attorney), and Defendant Lieutenant Joseph L. Rader (of the Virginia State Police) conduct an investigation into whether the deputies had offered perjured testimony. Rader and Payne reviewed the allegations and, by letter dated July 23, 2007, Payne informed counsel that his review and investigation led him to conclude that the deputies had not committed perjury and that there had been no conspiracy to convict Plaintiffs of obstruction of justice.

By letter dated December 12, 2007, counsel requested that Defendants Governor Kaine and Attorney General McDonnell investigate whether the deputies testified truthfully. Counsel also requested that the matter be referred to a "special prosecutor." By letter dated january 14, 2008,

Defendant Assistant Attorney General Dion informed counsel that "the Office [of the Attorney General] is without authority to act" upon his request.

Plaintiffs filed the instant lawsuit on August 1, 2008. The Court will introduce additional facts as necessary in its discussion.

II. STANDARDS OF REVIEW

A. Fed. R. Civ. P. 12(b)(1)

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits a party to move for dismissal of an action based on lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A plaintiff "has the burden of proving that subject matter jurisdiction exists." *Evans v. B. F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). In considering a motion to dismiss pursuant to Rule 12(b)(1), a court should "regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding t one for summary judgment." *Id.* (internal citation omitted). The moving party's motion to dismiss should be granted when "the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* (internal citation omitted).

B. Fed. R. civ. P. 12(b)(6)

"The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a omplaint." not to "resolve

contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Edwards v. City of Goldsboro,* 178 F.3d 231, 243-44 (4th Cir. 1999). In considering a Rule 12(b)(6) motion, a court must accept all allegations in the complaint as true and must draw all reasonable inferences in favor of the plaintiff. *See id.*, at 244; *Warner v. Buck Creek Nursery, Inc.*, 149 F. Supp. 2d 246, 254-55 (W.D. Va. 2001). The plaintiff must allege facts that "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S. Ct. 1955, 1965 (2007). "[A] rule 12(b)(6) motion should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards,* 178 F.3d at 244. A complaint may not be dismissed if it alleges "enough facts to state a claim to relief that is plausible on its face." *Bell Alt. Corp.*, 550 U.S. at ___, 127 S. Ct. at 1974. Nonetheless, "[w]hile a complaint attecked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of cause of action will not do." *Bell Atl. Corp.*, 550 U.S. at ___, 127 S. Ct. at 1967-65. When dismissing a complaint for failure to state a claim upon which relief may be granted, courts may consider exhibits attached to the complaint, and where a conflict exists between "the bare allegations of the complaint and any attached exhibit, the exhibit prevails," *United States ex rel.*

Constructors, Inc. v. Gulf Ins. Co., 313 F supp. 2d 593, 596 (E.D. Va 2004) (citing *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991)); *see also Anheuser-Busch v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995), *vacated and remanded on other grounds, 517 U.S. 1206(1996).*

III. DISCUSSION

A. Plaintiffs' Allegations

Plaintiffs contend that, on February 16, 2006, Deputies McCarthy and Bridgwater conducted an illegal search of Plaintiffs' premises while Plaintiffs were away from the property, that Deputy McCarthy blocked Mrs. Smith's van from entering her driveway, and that Deputy McCarthy asked Mrs. Smith "questions in an arrogant, highly suspicious, intemperate and high-handed fashion. . ." Plaintiffs allege that Deputy McCarthy stated his intention to search the van, to which Mrs. Smith responded, No, you're not," and then physically blocked McCarthy's access to the side of the van, whereupon Deputy McCarthy "smash[ed]" Mrs. Smith's head into the side of the van, "dropped' her into a ditch," and "brutally handcuffed her." According to Plaintiffs, when Mr. Smith arrived and attemoted to protect his wife by grabbing Deputy McCarthy's shirt, Deputy McCarthy "maced him.[7] Plaintiffs state that, after they were arrested, "defendants Dixon and Brantley arrived at the scene and all four [of the Nelson County Sheriff's Department] defendants conferred at times as an entire group and at times in smaller

groups out of the earshot of the plaintiffs and appeared at times to be talking on cell phones."

Plaintiffs contend that on May 10, 2006, Defendant Payne, who was acting in his capacity as the commonwealth's Attorney conducting the prosecution against the Smiths, gave their counsel "unsolicited" documents consisting of a "confidential supplement" and dispatch logs. Plaintiffs allege that, approximately one week before the trial on August 2, 2006, their counsel mailed letters, dated July 25, 2006 to Captain Dixon and Commonwealth's Attorney Payne requesting the names of the deputies who had visited Plaintiffs' property on the evening of February 15, 2006.[8] Plaintiffs complain that their attorney did not receive the names of the deputies prior to the trial, and they allege that the names constitute exculpatory evidence.[9] Plaintiffs add that, in their view, McCarthy and Bridge water did not have"legal justification for entering plaintiffs' property." Plaintiffs aver that, at the trial in the Nelson GDC, Deputies McCarthy and Bridgewater provided false testimony regarding the registration of the green Dodge pickup truck.

In the "First Count" of their Complaint, Plaintiffs state the following:

> 29. Soon after the attack on Donna Smith and the arrest of Plaintiffs and continuing until [the trial in the Nelson GDC on] August 2, 2006, defendants McCarthy, Bridgewater, Dixon, Brantley and Payne, individually and in concert with each other, willfully, knowingly, and with specific intent

to deprive plaintiffs of their rights hereinafter described, agreed, combined and conspired to seek the conviction of plaintiffs foe obstrucion of justice which was the objective of the conspiracy. Defendants sought such convictions not only to justify McCarthy's unprovoked attack but to interpose them as affirmative defenses to any personal injury claims arising from the illegal entry onto the Smiths' property, the attack of defendant McCarthy upon Donna Smith, her arrest, and the assault upon, and the arrest of Don Smith by defendant Bridgwater [sic] which plaintiffs might file as a result of that day's events. And in fact, defendant McCarthy has pleaded the Circuit Court complaint for personal injuries for trespass, assault and batter and malicious prosecution. . .

30. In furtherance if the conspiracy which attained its objective as to Donna Smith by her conviction of August 2, 2006, said defendants, individually and in concert with each other did maliciously and without legal cause, justification or excuse, with intent to injure, oppress, threaten, and intimidate plaintiffs in the exercise if their constitutional and federal statutory rights dscribed below (1) issue aforesaid summonses to the Smiths accusing them of fabricated charges of obstruction of justice, a Class I misdemeanor; (2) provided the Smiths before trial, in an attempt to induce them to plead guilty to the fabricated charges, with unsolicited evidence showing gratuitous self-serving additions to

the dispatch notes, Exhibit "C", [sic] the additions being made well after defendants McCarthy and Bridgwater [sic] had departed the Smith property; (3) provided the Smiths before trail, in an attempt to induce them to plead guilty to the fabricated charges, with the fabrication of an "official" version of the events suggesting that Donna Smith was a felon guilty of harboring a fugitive and that she created the disturbance with McCarthy so as to divert attention from David Reier's imaginary escape, all as highly suggested in the Confidential Supplement, Exhibit "B" and strongly implied in the Nelson County General District Court's finding of Donna Smith's guilt; (4) fixed and coordinated their testimony before trial so that it would tend to support the fabricated "official" version' (4) [sic] failed to provide plaintiffs with evidence before trial, as they were required to do, of the night before by the two (2) deputies; presented untruthful testimony to the court on issues of probable cause and identification of the truck as more fully detailed above and (6) presented untruthful testimony at trail an all other material issues of the case.

31. Each of defendants McCarthy, Bridgwater, Dixon, Brantley and Payne, individually and in concert with each other, acted without authorization of law, under pretense and color of law and in his official capacity, with the specific intent to deprive plaintiffs of their rights (1) to freedom from

illegal searches and seizure and seizure of their persons and property; (2) to freedom from unlawful arrest, detention and imprisonment; (3) not to be deprived of life, liberty or property without due process of law; (4) not to be falsely "criminalized" by state officers in order to protect a criminal state officer(s); (5) to defend themselves as criminally accused persons; (6) as victims of crime to the protection of police officers, the courts and the law and to have the wrongdoers duly prosecuted and punished and (7) not to be deprived of any and all further rights guaranteed them by the Constitution of the United States, Sections 1981, 1983 an d 1985 of Title 42 of the United States Code and any and all other federal statutes for such cases made and provided.

The "Second Count" of the Complaint states:

33. After the trial was concluded, plaintiffs ordered the transcript of the trial and conferred with Tyler[10] about an appeal of Donna Smith's conviction. Certain that fraud had been visited upon the General District Court, they decided that the conviction would be vacated easily once the transcript and other material were referred to Payne, whose participation was not suspected at the time, and other law enforcement authorities, as Tyler was required to do as an officer of the Court. Confident that justice would be done, they declined to appeal. Accordingly, with a letter dated February 27, 2007 a partially

reacted copy of which is attached hereto as Exhibit "E", [sic] Tyler delivered by certified mail, return receipt requested, the transcript and other related material to defendant Payne and and [sic] to the Appomattox unit of the Virginia State Police, reporting his"considered opinion" of the case.

34. After a meeting in his Afton office with defendant Rader, Tyler wrote a letter to defendant Rader dated March 22, 2007, with a copy to defendant Payne, and mailed the same, certified mail, return receipt requested, to both of them. A true copy of said letter dated March 22, 2007, is attached hereto as Exhibit "F". [sic] Defendant Payne acknowledged the receipt of the material by faxed letter dated March 29, 2007, a copy of which is attached as Exhibit "G", [sic] making no comment with respect to the matters set forth in Tyler's letter dated March 22, 2007.

35. By letter dated July 23, 2007, a true copy of which is attached hereto as Exhibit "H", [sic] defendants Payne and Rader communicated to Tyler their determination that there was no perjury nor conspiracy.

36. By letter dated September 17, 2007, a true copy of which is attached hereto as Exhibit "I", Tyler expressed his disappointment with the conclusion of Payne and Rader and informed Payne that the matter would "be referred to the next level."

37. On December 12, 2007, Tyler referred the matter to defendants Kaine and McDonnell, who received them on December 14, 2007. A true copy of Tyler's letter dated December 13, 2007, along with a "compendium" of the enclosures mailed to said defendants by certified mail, return receipt requested, are attached hereto as Exhibit "J". [sic]

38. Under Section 2.2-511 of the Code of Virginia (1950), as amended, defendant McDonnell had no authority to institute and conduct criminal prosecutions in the Nelson County Circuit Court without the "concurrence of the local attorney for the Commonwealth" unless "specifically requested by the Governor to do so." It was the joint and several duty of defendants Kaine and McDonnell, upon the receipt of the material from Tyler, to fully and impartially investigate the matters referred to them and take such action as the law and justice demanded, and under a reasonable view of the evidence presented to them, certainly not deferring to the findings of "the local attorney for the Commonwealth" and defendant Rader. Moreover, even if McDonnell were personally limited by §2.2-511 to intervene in this matter, it was incumbent upon him to urge Kaine to make the specific request contemplated by the statute, and it was incumbent upon Kaine to make that specific request even in the absence of McDonnell's recommendation that he do so.

> 39. Nevertheless, in spite of said duties, defendant Shannon Y. Dion, writing on behalf of defendant McDonnell and defendant Department of State Police, and presumably on behalf of defendant Kaine, by letter dated January 14, 2008, a true copy of which is attached hereto as Exhibit "K", informed Tyler that the Office of the Attorney General was "without authority" to act.
>
> 40. Defendants Rader, Dion, attorney for the Department of State Police, McDonnell and Kaine acquiesced in, condoned and ratified the actions of defendants McCarthy, Bridgwater [sic], Dixon, Brantly and Payne set forth in the First Count and that acquiescence, condonation and ratification continues to date, all justifying joining the Department of State Police and Commonwealth of Virginia as defendants in this civil action and as such defendants, making them liable to plaintiffs Smith. . . .

Defendants have raised a number of defenses. Because three separate groups of Defendants have filed three separate Motions to Dismiss, raising a number of potential defenses, the Court will discuss the applicable defenses in its analysis.

B. Analysis

1. Plaintiffs Fail to State a Claim Under 42 U.S.C. § 1981

Section 1981 of Title 42 of the United States Code "has a specific function: It protects the equal right of '[a]ll persons within the jurisdiction of the United States' o 'make and enforce contracts' without respect to race." *Domino's Pitta, Inc. v. McDonald*, 546 U.S. 470, 474 (2006) (quoting 42 U.S.C. ¶ 1981(a)). It is clear, then, that 42 U.S.C. § 1981 is inapposite here.[11] Accordingly, any claim against any of the Defendants purported to have been brought under § 1981 is dismissed for failure to state a claim upon which relief may be granted.

2. Plaintiffs Fail to State a Claim Under 42 U.S.C. § 1985

As for Plaintiffs' claims of conspiracy to violate their constitutional rights under 42 U.S.C. § 1985, the complaint fails to establish any facts or allegations of a conspiracy under that section. Plaintiffs do not specify upon which paragraph or clause of § 1985 they base their conspiracy claim; however, it is clear that the only possibly applicable portions are the first portion of § 1985(3) and the second clause of § 1985(2).[12]

To establish a sufficient cause of action for "conspiracy to deny equal protection of the laws under § 1985(3), a plaintiff must allege:

> (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a

> consequence of an overt act committed by he defendants in connection with the conspiracy . . . . Moreover, the law is well settled that to prove a section 1985 "conspiracy," a claimant must show an agreement or a "meeting of the minds" by defendants to violate the claimant's constitutional rights.

Simmons v. Poe, 47 F.3d 1370, 1376-77 (4th cir. 1995) (citations omitted) (emphasis added); *see also Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). "To meet the requirement of a class-based discriminatory animus, under this section the class must possess the 'discrete, insular and immutable characteristics comparable to those characterizing classes such as race, national origin and sex.'" *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985) (citation omitted). Moreover, to state "'conspiracy claims under § 1985(3) or § 1983,'" a plaintiff must "'plead specific facts in a nonconclusory fashion to survive a motion to dismiss.'" *Simmons*, 47 F.3d at 1377 (quoting *Gooden v. Howard County*, 954 F.2d 960, 969-970 (4th cir. 1992)).

To state a claim under the second clause of § 1985(2), "'[t]he language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" *Kush v. Rutledge*, 460 U.S. 719, 725-26 (1986) (quoting *Griffin*, 403 U.S. at 102) (holding that the absence of such language in the first clause

of § 1985(2) means that "Congress did not intend to impose a requirement of class-based animus on persons seeking to prove a violation of their rights under the first clause of § 1985(2)"); *see also Bloch v. Mountain Mission School*, 846 F.2d 69 (4th Cir. 1988) (Table) (post-*Kush*, observing that a racial or class-based animus is necessary for a violation of the first part of § 1985(3) and the second part of § 1985(2)); *Dotson and Bloch v. The Mountain Mission School, et al.*, 692 F.2d 752 (4th Cir. 1982) (Table) (pre-*Kush*, reasoning that racial or class-based animus is necessary for a violation of the second clause of § 1985(2) because "[t]he 'equality' language that is the foundation for the class-based animus requirement in § 1985(3) is conspicuously absent from the first half of § 1985(2) but is present in the second half of § 1985(2)").

In this case, Plaintiffs have not alleged that any Defendants harbored any racial or class-based discriminatory animus against them.[13] Nowhere does the instant Complaint provide any facts lending any support whatsoever to a conspiracy claim under § 1985. In fact, the § 1985 conspiracy allegation is entirely conclusory, and the complaint is completely devoid of any suggestion that "two or more" of the Defendants, "motivated by a specific class-based, invidiously discriminatory animus," conspired to violate Plaintiffs' civil rights. Accordingly, any claim alleged against any of the Defendants under § 1985 is dismissed for failure to state a claim upon which relief may be granted.

3. § 1983 Claims Outside the Statute of Limitations

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the Constitution or laws of the united States and must show that the deprivation of that right was committed by a person acting under color of state law. *West v. Atkins, 487 U.S. 42, 48 (1988).*

There is no federal statute of limitations applicable in § 1983 actions. *Wilson v. Garcia*, 471 U.S. 261, 266 (1985). Accordingly, § 1983 actions are governed by the state statute of limitations for general personal injury cases in the state where the alleged violations occur. *Owens v. Okure*, 488 U.S. 235, 239-40 (1989). Virginia has a two-year statute of limitations for genera, personal injury claims. Va. Code Ann. § 8.01-243(a). Therefore, a plaintiff bringing a civil rights action under § 1983 in Virginia must do so within two years from the tie when his action accrues. *Id.* However, the time of accrual of a cause of action udner § 1983 is a federal question.[14] *Nasim v. Warden, Md. House of Correction*, 64 F.3d 951, 955 (4th Cir. 1995) (*en banc).* Additionally, the Supreme Court of the United States has recognized that, although it had "never stated so expressly, the accrual date of a § 1983 cause of action is a question of federal law that is not resolved by reference to state law." *Wallace v. Kato*, ____ U.S. ____, 127 S. Ct. 1091, 1095 (2007). In *Nasim*, the United States Court of Appeals for the Fourth Circuit held that a cause of action under § 1983 accrues and the statute of limitations begins running "when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his case of action." *Id.* (citation omitted).

In this case, the complaint was filed on August 1, 2008, and any claims regarding the events of February 16, 2006 - excessive force, violations of Plaintiffs' due process rights, illegal entry upon Plaintiffs' property, illegal search and seizure, etc. - are untimely and therefore fail to state a claim upon which relief may be granted. *See, e.g., Lewis v. Richmond City Police Dep't.*, 924 F.2d 733, 735 (4th Cir. 1991). Accordingly, such claims are dismissed.

4. Remaining Claims Under 42 U.S.C. § 1983

a. The "State Defendants"

The "State Defendants" are as follows: Commonwealth of Virginia; the Department of State Police; the Honorable Timothy M. Kaine, Governor the Honorable Robert F. McDonnell, Attorney General; Shannon Y. Dion, Assistant Attorney General; and Virginia State Police Lieutenant Joseph L. Rader. The State Defendants have filed one Motion to dismiss (docket nos. 28 & 29). For the following reasons, the remaining § 1983 claims against the State Defendants will be dismissed.

Eleventh Amendment

Plaintiffs' claims against the State Defendants must be dismissed for lack of subject matter jurisdiction because the claims are barred by the Eleventh Amendment. The Eleventh Amendment bars citizens from bringing a suit in federal court against their own state. *See Hans v. Louisiana*, 134 U.S. 1 (1890). "[T]he essence of the [Eleventh

Amendment] immunity is that the State cannot be sued in federal court at all, even where the claim has merit, and the importance of immunity as an attribute of the States' sovereignty is such that a court should address that issue promptly once the State asserts its immunity." *Constantine v. rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 482 n.4 (4th cir. 2005).

The Eleventh Amendment also bars claims against state agencies. *See id.* at 479. Plaintiffs' suit against the Commonwealth and the Department of State Police is barred by the Eleventh Amendment and therefore shall be dismissed. Furthermore, Eleventh Amendment immunity extends to state officials who are sued for damages in their official capacity, since such actions merely constitute suits agains the state. "[A] suit against a state official in his or her official capacity is not a suit agains the official but rather is a suit agains the official's office. As such, it is no different from a suit against the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (citations omitted). This Court is without jurisdiction to hear and decide Plaintiffs' claims for money damages against individual State Defendants in their official capacity. As such, Plaintiffs' claims against Governor Kaine, Attorney General McDonnell, Assistant Attorney General Dion and Lieutenant Rader in their official capacity must be dismissed.

Qualified Immunity

Furthermore, the individual State Defendants are immune from Plaintiffs' suit for money damages

on the basis of qualified immunity because these Defendants did not violate any clearly established constitutional rights of which reasonable state officers would have been aware. qualified immunity shields public officers "from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Hope* at 752 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). It is "an entitlement not to stand trial or face the other burdens of litigation. The privilege is an immunity from suit rather than a mere defense to liability." *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (internal quotations and citations omitted).

In order to determine the issue of qualified immunity, a court must first ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the office's conduct violated a constitutional right?" *Saucier* at 201. If a violation occurred, "the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* at 200. for a constitutional right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Here, Plaintiffs base their claims against the individual State Defendants on the argument that Plaintiffs have a constitutional right to have their allegations of perjury investigated and subsequently prosecuted. However, Plaintiffs have no right to a criminal investigation or to the criminal prosecution of another. *Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988); *West v. Wall*, No. 2:06cv640, 2007 U.S. Dist. LEXIS 19156, at *5-6 (E.D. Va. Mar. 16, 2007). Plaintiffs' failure to allege the violation of a constitutional right entitles the individual State Defendants to qualified immunity.[15]

Failure to State a Claim

Plaintiffs fail to state a claim under § 1983 against the Commonwealth, the Department of State Police and the individual State Defendants in their official capacity, as none are "persons" amendable to suit under 42 U.S.C. § 1983. A claim brought pursuant to § 1983 requires the deprivation of a civil right by a "person" acting under color of state law. *See Will v. Michigan Dep't. of State Police*, 491 U.S. at 70-71. A state cannot be sued under Section 1983. *Id.* Similarly, the Department of State Police, as a state agency, is not a "person" within the meaning of § 1983. *See id.* In addition, none of the individual State Defendants, acting in his or her official capacity, is a "person" for the purposes of the statute. *See id.* ("neither a State nor its officials acting in their official capacities are 'persons' under § 1983").

To the extent Plaintiffs attempt to assert a claim against the individual State Defendants in their individual capacity, Plaintiffs' § 1983 claim must also be dismissed. A plaintiff must affirmatively allege a defendant's personal involvement in order to state a claim under 42 U.S.C. § 1983, and here, Plaintiffs have alleged no direct personal action taken against them by any individual State Defendant in violation of their constitutional rights. *See Garraghty v. Va. Dep. of Corrections*, 52 F.3d 1274, 1280 (4th Cir. 1995); *Wright v. Collins*, 766 F.2d 841, 949 (4th cir. 1985); and *Barrow v. Bounds*, 498 F.2d 1397 (4th Cir. 1974) (Table).

As previously discussed herein, Plaintiffs have no right to the investigation of their claims of perjury nor do they have right to the criminal prosecution of another. *Sattler, 857 F.2d at 227; West, 2007 U.S. Dist. LEXIS 19156, at *5-6. In* Sattler, the plaintiff alleged a violation of § 1983 on the basis that he had a constitutional right o have certain individuals prosecuted for arson. 857 F.2d at 226-227. The Fourth Circuit rejected this premise, observing that no such right exists. *Id.* at 227. Nor will the benefit of having someone else arrested for a crime generally trigger a due process claim. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005). In *West v. Wall*, the court granted the defendant's motion to dismiss because the plaintiff could not base his § 1983 claim on the alleged failure of the Norfolk Police Department to properly investigate his son's death and to ensure prosecution. 1007 U.S. Dist. LEXIS 19156, at *5-6.

Here, Plaintiffs cannot hold Governor Kaine, Attorney General McDonnell, Assistant Attorney General Dion or Lieutenant Rader liable under § 1983 for the alleged failure to investigate and ensure the prosecution of Defendants McCarthy and Bridgwater when no such right exists. And, to the extent that Plaintiffs assert conspiracy claims under § 1983 against the State Defendants, a plaintiff must "plead specific facts in a nonconclusory fashion to survive a motion to dismiss,'" *Simmons*, 47 F.3d at 1377 (quoting *Gooden*, 954 F.2d at 969-970), and here Plaintiffs have alleged no direct personal action taken by any individual State Defendant that amounts to a deprivation of a constitutional right. The Complaint does not contain sufficient allegations to state a claim against the individual State Defendants in their individual capacity and is therefore dismissed.[16]

b. The "Nelson Defendants"

The Nelson County Sheriff's Department Defendants (the "Nelson Defendants") are as follows: Michael R. McCarthy; Malcolm E. Bridgewater; John M. Dixon, II; and Gary L. Brantley. The Nelson Defendants have filed one Motion to Dismiss (docket nos. 30 & 31). For the following reasons, the remaining § 1983 claims against the Nelson Defendants will be dismissed.

In the first instance, the complaint seeks to bring claims against the Nelson Defendants in their official capacities as deputies (and then-Sheriff) of the Nelson County sheriff's Department. The Nelson Defendants are officers of the Nelson County

Sheriff's Department, which is a political subdivision of the Commonwealth of Virginia. As such, a suit against them in their official capacities is a suit against the Commonwealth itself; thus, the court lacks subject matter jurisdiction over Plaintiffs' money damages claim. *See, e.g., Harris v. Hyter*, 1970 F. Supp. 500 (W.D. Va. 1997).

Regarding Plaintiffs' claim that Bridgewater or McCarthy presented perjured testimony at Plaintiffs' trial before the Nelson GDC, the Supreme Court of the United States has specifically held that police officers are immune from an action arising under § 1983 arising out of allegedly perjured testimony. In *Briscoe v. LaHue*, 460 U.S. 325, 342-43 (1983) the Court held that, although police officers may be held criminally liable for perjury, they, like all other witnesses, are absolutely immune from a claim fro damages for giving perjured testimony at a criminal trial.[17]

Plaintiffs claim that the deputies failed to provide Plaintiffs with purportedly "exculpatory" evidence before trial.[18] There is no constitutional violation where a police officer fails to disclose evidence directly to defense counsel. *Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000) (*"Jean II"*) (Wilkinson, J., concurring) (*en banc*)[19]; *see also Washington v. Buraker*, 322 F. Supp. 2d 692, 699-701 (W.D. Va. 2004). That is a duty that rests with the prosecution. *Kd.* at 660-62. such a claim requires "at a minimum that an actual bad faith deprivation of due process rights be alleged." *Id.* at 662. As with the plaintiff in *Jean II*, who contended "that the officers acted in a 'willful, wanton and

reckless manner,' conclusory allegations will not suffice." *Id.* ("Jean simply is unable to provide evidence of a bad faith deprivation carried out by [defendants] - a matter on which the burden plainly rests with the plaintiff. For example, Jean does not claim that [defendants] destroyed or otherwise failed to preserve the evidence that is now at issue - a fact which alone tends to negate any inference of bad faith"). Moreover, the evidence Plaintiffs claim to have been "exculpatory" does not meet the definition of "exculpatory" evidence. "Exculpatory" evidence is defined as evidence that is material to the issue of guilt or innocence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). The issue of probable cause and the issue of guilt or innocence are not the same. The failure to disclose information that is relevant only to the issue of probable cause to bring the charges is insufficient to establish a constitutional violation. *See Wilkins v. Clary*, 2005 WL 1705211 (E.D. Va. 2005), *aff'd*, 216 Fed. Appx. 322 (4th Cir. 2007) (holding that a criminal defendant had not been denied a right to a fair trial by law enforcement's failure to produce evidence to the grand jury that would have disclosed a lack of probable cause for the charges).

Regarding any claim of conspiracy to violate Plaintiffs' constitutional rights under § 1983, the Complaint fails. Plaintiffs claim that Defendants "fixed and coordinated their testimony before trial," but the testimony that Plaintiffs claim was "fixed and coordinated" concerns not the Smiths' guilt or innocence of the state misdemeanor charge of obstruction of justice; rather, Plaintiffs claim that the Deputies did not have cause to be on their

property on February 16, 2006. However, it is clear from the Complaint itself that no constitutional right was violated by Bridgewater and McCarthy's entry upon Plaintiffs' property. If there has been no violation of a constitutional right, a § 1983 action is barred. *See Chavez v. Martinez*, 538 U.S. 760, 772 (2003) (Thomas, J., plurality opinion) (holding that, because an officer's actions did not violate the plaintiff's constitutional rights, the actions "cannot be grounds for a ¶ 1983 action"). Additionally, in determining whether a state actor is immune from suit under qualified immunity, a court must first determine whether "the officer's conduct violated a constitutional right[.] *Saucier*, 533 U.S. at 201. The qualified immunity "sequential" inquiry proceeds only if a violation occurred. *Id.* at 200.

Plaintiffs allege that Defendants, "without any cause or legal justification whatsoever, entered onto plaintiffs' property," thereby depriving plaintiffs of their right "to freedom from illegal searches and seizure of their persons and property." However, no constitutional right was violated when the deputies "entered onto plaintiffs' property." In evaluating a search under the Fourth Amendment, the alleged bad faith or subjective intent of an officer is irrelevant, and the search is evaluated from an objective perspective. *Brigham City v. Stuart*, 547 U.S. 398, 404-05 (1006). In *Brigham City*, the Supreme Court held that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify [the] action. . . . The officer's subjective motivation is

irrelevant." *Id.* at 404 (internal citations and quotations omitted).

It is objectively reasonable for a police officer to approach a private residence by the driveway or sidewalk to speak with the owners.

> Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned violation of the person's right of privacy, for any one openly and peaceably . . . to walk up the steps and knock on the front door of any man's "castle" . . . whether the questioner be a pollster, a salesman, or an officer of the law.

United States v. Taylor, 90 F.3d 903, 909 (4th cir. 1996) (internal quotations and citations omitted); *see also United States v. Bradshaw*, 490 F.2d 1097, 1100 (4th Cir. 1974) (stating that law enforcement officers "were clearly entitled to go onto defendant's premises in order to question him"). In the instant case, it is clear that McCarthy and Bridgewater were justified in proceeding by car down the Plaintiffs' driveway and parking their car on the driveway in order to inquire about the green Dodge pickup truck and the possibility that Reier was present on the premises.[20]

Furthermore, an essential element for a claim of a conspiracy to deprive a plaintiff of a constitutional right is an agreement to do so among the alleged co-conspirators. *Ballinger v. N.C. Agric. Extension Serv.*, 815 F.2d 1001, 1006-07 (4th Cir.

1987). Without a meeting of the minds, the independent acts of two or ore wrongdoers do not amount to a conspiracy. *Murdaugh Volkswagon v. First Nat'l Bank*, 639 F.2d 1073, 1075-76 (4th Cir. 1981). Plaintiffs must allege facts showing that Defendants shared a "unity of purpose or a common design" to injure them. *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946). When a plaintiff makes only conclusory allegations of a conspiracy and fails to demonstrate any agreement or meeting of the minds among the defendants, I may properly dismiss the complaint. *See Woodrum v. Woodward County, Okla.*, 866 F.2d 1121, 1126-27 (9th cir. 1989); *Cole v. Gray*, 638 F.2d 804, 811-12 (5th Cir. 1981).

Plaintiffs fail to allege any facts indicating that the Nelson Defendants acted jointly to injure them. Plaintiffs rely on conclusory allegations that, after having arrested them, the Nelson Defendants somehow colluded because they stood aside and "conferred" "out of the earshot of the plaintiffs,," and "appeared at times to be talking on cell phones." *See Adams v. Rice*, 40 F.3d 72, 74 (4th cir. 1994) (holding complaint dismissed because it did not have any factual supporting bare assertions); *White v. White*, 886 F.2d 721, 724 (4th cir. 1989) (same). The instant complaint relies on conjecture and is devoid of any sufficient allegation of the Nelson Defendants' meeting of the minds. Moreover, Plaintiffs do not show that any actual deprivation of their constitutional rights resulted from the alleged conspiracy, because there can be no conspiracy to do what the law allows, and the nelson Defendants were not outside the law when they entered

Plaintiffs' property seeking to learn the whereabouts of Mrs. Smith's son.[21]

c. *Phillip D. Payne, IV*

As for any remaining claims under § 1983 against Commonwealth's Attorney Phillip D. Payne, IV, his Motion to Dismiss (docket nos. 32 & 33) will be granted for the following reasons.

Absolute Immunity - Prosecutorial Immunity

Plaintiffs seek to recover damages from Payne, then and now the Commonwealth's Attorney for Nelson County, Virginia, on a theory that he conspired with the officers to provide false testimony at trial. Payne is entitled to absolute prosecutorial immunity. The law is clear that a state prosecuting attorney is absolutely immune from liability for damages under § 1983 for allegedly "conspiring" with police officers to present false testimony at a criminal trial and for the alleged withholding of exculpatory evidence (or, in the instant case, the alleged disclosure of "unsolicited" evidence). *See Carter v. Burch*, 34 F.3d 257, 263 (4th cir. 1994) (holding that a state prosecuting attorney is absolutely immune from liability for damages for conspiring with police officers to present false testimony and for withholding exculpatory evidence prior to trial); *see also Imbler v. Pachtman*, 424 U.S.409, 422-23 (1976).[22] Nothing in the allegations against Payne suggest that any of his alleged conduct was undertaken outside of his prosecutorial role.

Eleventh Amendment

Additionally, Plaintiffs' claims against Payne in his official capacity are barred by the Eleventh Amendment. As a constitutional officer, a Commonwealth's Attorney is immune from liability. *See Ram Ditta v.d Maryland Nat' Capital park and Planning Comm.*, 822 F.2d 456, 457-58 (4th Cir. 1987); *Blankenship v. Warren Co.*, 918 F. Supp. 970, 974 n. 4 (W.D. Va. 1996) ("The Virginia Constitution creates five state officers which re charged with performing quintessential functions of state government: Commonwealth's Attorney, Treasurer, Commissioner of Revenue, Sheriff, and Clerk of the Court. . . [T]hese officers are . . . state actors and . . . are entitled to immunity pursuant to the Eleventh Amendment"); *see also Plaster v. Brown*, 2005 WL 3021961 (W.D. Va. Nov. 8, 2005), adopted in pertinent part by *Plaster v. Brown*, 2006 WL 240866 (W.D. VA. Feb. 1, 2006).

Failure to State a Claim

As explained elsewhere in this opinion, a plaintiff must affirmatively allege a defendant's personal involvement in order to state a claim under 42 U.S.C. § 1983. *See Garraghty*, 52 F.3d at 1280; *Wright*, 766 F.2d at 949; and *Barrow*, 498 F.2d 1397 (Table). In addition to the claims that Payne disclosed "unsolicited" evidence and failed to disclose allegedly exculpatory evidence, Plaintiffs seek to impose liability against Payne for the actions of the deputies during the search and arrest of Plaintiffs and for the alleged presentation of false testimony by the deputies.

There is no allegation that Payne knew about, gave advice regarding, or otherwise participated in Plaintiffs' arrest and the alleged search. The allegations do not suggest that Payne became involved until after the charges had been served. Consequently, payne cannot be liable for the actions of the deputies during the arrest and the alleged search.

Regarding the allegation that Payne "conspired" with the deputies to present false testimony at the trial, there are simply no specific allegations to suggest his personal involvement. For example, there are no allegations that he knew ahead of time that the deputies intended to present false testimony, that he knew at the time the testimony was given that it was false, or, more importantly, that he took any affirmative action to encourage the presentation of false testimony. One is left to guess at how Payne may have "conspired" with the deputies to present false testimony, or what testimony may have been materially false as to the conduct with which Mrs. Smith was charged.[23] This is insufficient to state a conspiracy claim under 42 U.S.C. § 1983. As previously explained, to assert conspiracy claims under § 1983, a plaintiff must "'plead specific facts in a nonconclusory fashion to survive a motion to dismiss.'" *Simmons*, 47 F.3d at 1377 (Quoting *Gooden*, 954 F.2d at 969-970). At the December 19, 2008, hearing regarding the Motions to Dismiss, Plaintiffs' counsel implied that Payne and the nelson Defendants communicated while the Nelson Defendants were still at Plaintiffs' property, stating: "the highest ranking members of the

sheriff's department are at the scene, they're communicating. Who would they be communicating with?" Plaintiffs' counsel also stated that "[t]he allegation [against Payne] is that he was the one who instituted from the get-go, as soon as Donna Smith was dragged out of the ditch by the handcuffs, they were down there setting her up to get convicted." These statements perfectly illustrate the conclusory nature of Plaintiffs' allegations.

Furthermore, Plaintiffs must allege that Payne acted in concert with co-conspirators, that each co-conspirator shared the same conspiratorial objective to violate Plaintiffs' constitutional rights, and that the conspirators committed some "overt act . . . in furtherance of the conspiracy which resulted in . . .[a] deprivation of a constitutional right . . ." *Hinkle v. City of Clarksburg*, 81 F.3d 416, 421 94th cir. 1996) (citation omitted). There are no such allegations here. The only allegations of personal involvement by Defendant Payne are those allegations concerning the disclosure of "unsolicited" evidence,d and the alleged failure to disclose exculpatory evidence. There is no allegation why or how the disclosure of "unsolicited" evidence deprived Plaintiffs of any rights. Regarding the failure to disclose allegedly exculpatory evidence, Plaintiffs attached Exhibit D to the complaint (a letter that was mailed less than a week before the trial date) in which Plaintiffs' counsel requested the identity of certain deputies who were present on the property the night before the arrest. Construing the Complaint liberally, it appears that Plaintiffs must have intended to imply that this amounted to a request for exculpatory evidence under *Brady v.*

Maryland, 37 U.S. 83 (1963). Plaintiffs argue that the individuals whose identity they sought may have been able to establish that, on the prior evening, the vehicle on the premises was determined not to have ben registered to Reier, the fugitive. Therefore, Plaintiffs argue, it was relevant to the issue of whether the deputies on the following day had probable cause go be on the premises in the first place. however, as previously discussed, by definition this information does not constitute "exculpatory" evidence, which is defined as evidence that is material to the issue of guilt or innocence. *See Bagley*, 473 U.S. at 676. The issue of probable cause and the issue of guilt or innocence are not the same. The failure to disclose information that is relevant only to the issue of probable cause to bring the charges is insufficient to establish a constitutional violation. *See Wilkins*, 2005 WL 1705211.

Plaintiffs' request, at best, constitutes an informal and unenforceable request for discovery, and in no way implicates the *Brady* disclosure requirements. This is supported by Plaintiffs' counsel's own conduct at the trial as set out in the Complaint. Obviously, by the time of trial, Plaintiffs' counsel knew that he had not received the names of the deputies that he had requested. Yet, in spite of this knowledge, he did not make a motion to compel, motion to suppress, or a motion for continuance, nor did he otherwise notify the trial judge. Under Rule 7C:5 of the Rules of the Supreme Court of Virginia, discovery in a case such as the Smith's is permitted only by Order of the court upon a motion filed by the accused at least 10 days before trial.[24] The instant

Complaint, the record of the Nelson GDC case, and Payne's motion to dismiss indicate that Plaintiffs did no file a motion for discovery. Moreover, the informal request for discovery was sent less than a week before the trial. This is not a case regarding the failure to disclose evidence the existence of which the criminal defendant was unaware. Clearly, Plaintiffs knew that they had not received the names of the deputies that they had requested, and yet they did nothing to remedy the circumstances upon which they now seek to base a civil rights claim against Payne. The likely inference to be made from these facts is that they did nothing because the information they sought had no bearing on the question whether Mrs. Smith committed the conduct for which she was convicted of a misdemeanor charge of obstruction of justice. Mrs. Smith did not even appeal her conviction. Payne's conduct, as alleged in the instant Complaint, simply does not establish a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" upon which relief can be granted under 42 U.S.C. § 1983.

IV. CONCLUSION

For the stated reasons, Defendants' Motions to Dismiss will be granted; accordingly, the Complaint will be dismissed and stricken from the active docket of the Court.

The clerk of the Court is hereby directed to send a certified copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

Entered this 7th day of January, 2009.

NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1] Plaintiffs name the following Defendants: "MICHAEL R. MCCARTHY, in his individual capacity and in his capacity as a Nelson County Deputy Sheriff; "MALCOLM E. BRIDGWATER, in his individual capacity and in his capacity as a Nelson County Deputy Sheriff"; "JOHN M. DIXON, II, in his individual capacity and in his capacity as a Nelson County Deputy Sheriff"; "GARY L. BRANTLEY, in his individual capacity and in his capacity as a Nelson County Deputy Sheriff", "PHILLIP D. PAYNE, IV, in his individual capacity and in his capacity as Nelson County Commonwealth's Attorney"; "JOSEPH L. RADER, in his individual capacity and in his capacity as a Virginia State Police Lieutenant"; "SHANNON Y. DION, in her individual capacity and in her capacity as a Virginia Assistant Attorney General"; "ROBERT F. MCDONNELL, in his individual capacity and in his capacity as the Attorney General of the Commonwealth of Virginia"; "TIMOTHY M. KAINE, in his individual capacity and in his capacity as Governor of the Commonwealth of Virginia"; "COMMONWEALTH OF VIRGINIA, by and through her duly established DEPARTMENT OF STATE POLICE"; and "UNKNOWN DEFENDANTS, in their individual capacities and in their capacities as employees of the Virginia State Police, the Attorney General and/or the Governor."

[2] The facts recounted herein are undisputed unless otherwise noted. The facts have been adduced from the Complaint, the attachments thereto, the Motions to Dismiss, and a transcript of Plaintiffs' August 2, 2006, criminal trial on charges of obstruction of justice in the General District Court of the County of Nelson. (As discussed further elsewhere in this opinion, Mrs. Smith was found guilty of a misdemeanor charge of obstruction of justice, the charge against Mr.Smith was dismissed, and Mrs. Smith did not

file an appeal.) Plaintiffs' counsel filed the transcript on Tuesday, December 16, 2008, three days before the hearing on the instant Motions to Dismiss; Plaintiffs' counsel also filed a "notice" that, in opposition to the Defendants' Motion to Dismiss' he would "partially rely on the transcript of August 2, 2006..." On Thursday, December 18, 2008, Defendants McCarthy, Bridgewater, Dixon, and Brantley filed objections to the submission of the transcript, station that "the submittal of the transcript is not in compliance with the Federal Rules of Civil Procedure and the Court's Pre-Trial Order and, therefore, should not be considered at this stage of the proceedings." However, the Complaint cites to and quotes from the transcript as an exhibit, and Plaintiffs' counsel's cover letter accompanying the Complaint further indicates that counsel intended to submit the transcript as an exhibit to the complaint. When dismissing a complaint for failure to state a claim upon which relief may be granted, courts may consider exhibits attached to the complaint, and where a conflict exists between "the bare allegations of the complaint and any attached exhibit, the exhibit prevails." *United States ex rel. Constructors, Inc. v. Gulf Ins. Co., 313 F. Supp. 2d 593, 596 (E.D. Va. 2004) (citing Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1465 (4th Cir. 1991)); *see also anheuser-Busch v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir 1995), *vacated and remanded on other grounds*, 517 U.S. 1206 (1996). At any rate, the Court has read the transcript merely to clarify and supplement its understanding of Plaintiffs' factual allegations (*e.g.*, the transcript indicates that the Nelson County Sheriff's Department defendants were looking for a "green Dodge pickup truck," rather than a "green pickup truck," and Mrs. Smith testified that she knew law enforcement officers had been looking for her son), and Defendants are not prejudiced by the Court's reading of the transcript. Accordingly, Defendants' objections are overruled.

[3] Plaintiff spells this Defendant's name "Bridgwater"; However, Defendants' Motion to Dismiss (docket no. 30) spells the name "Bridgewater." The Courts will Adopt the latter spelling.

[4] The record indicates that unspecified Nelson County officers had visited Plaintiffs' property the night before, and that the truck had been parked elsewhere on the property. On February 16, 2006, the deputies determined that the warmth of the hood and wetness on the tires and in the wheel well suggested that the truck had been recently driven.

[5] It is unclear whether McCarthy attempted to look through open or closed windows. In testimony at her trial for obstruction of justice, Mrs. Smith started that, because her windows are darkly tinted, McCarthy would have to get close to the windows to look through them; however, she later testified that he could simply have looked through the windows because "[t]he windows were down." At any rate. it is undisputed that McCarthy attempted to look through the windows into the van, whether through open windows or by raising his hands to shade his eyes to look through the tinted windows of the van.

[6] Plaintiffs are represented in the instant action by Bruce K. Tyler, the same attorney who represented them in the Nelson GDC. Additionally, the instant Complaint indicates that Tyler represents Plaintiffs in a case in the Circuit Court for Nelson County, arising out of the incidents of February 16, 2006, alleging "personal injuries for trespass, assault and battery and malicious prosecution...."

At the trial before the Nelson GDC, Plaintiffs testified that David Reier has never owned a vehicle registered in the Commonwealth of Virginia, and that the green dodge pickup truck was registered in Maryland in someone else's name. McCarthy's testimony included the following statements: "I ran the tags and it was, as I recall, it's registered to David Reier. I don't know if it was the tags or if I ran the [vehicle Identification Number ("VIN")], but it was his truck." However, McCarthy's testimony also revealed that his records for the events of February 16, 2006, do not indicate that he received - or did not receive - any verification of the truck's VIN. The following exchange

occurred during Plaintiffs' counsel's cross-examination of Deputy McCarthy:

> [Plaintiffs' counsel]: [Y]ou found papers in the truck that indicated [Reier] owned the truck. What papers did you look at?
>
> [Commonwealth's Attorney]: Judge, I object. Relevance to all this. The issue is obstruction of justice....
>
> [Plaintiffs' counsel]: An illegal arrest, Judge, is a perfect defense to it.
>
> THE COURT: What does the truck have to do with an illegal arrest?
>
> [Plaintiffs' counsel]: That they shouldn't have been on the property to begin with. They didn't have probable cause to even drive up the driveway.
>
> THE COURT: Well, you don't need probable cause to drive up the driveway, you just need reasonable or a particular suspicion that there may have been a fugitive some place.
>
> What we have is they see a color and type of make of a vehicle that an alleged fugitive has been seen driving. And so they go to investigate that.
>
> That's all we have at this stage. But, you know, what he did with the truck really doesn't have anything to do [sic]. Because if these folks are not the owners of the truck and it belongs to someone else, they've got no standing to argue what an officer did with that particular truck. Because it's immaterial to what they've been charged with.
>
> [Plaintiffs' counsel]: But it's very material to the search of the residence that these people refused to consent to. Because they're using the truck to try to

get into their residence. So the truck is very relevant to whether or not they can get into the Smiths' house.

THE COURT: But if they have decided, or gotten information that this vehicle belonged or was owned by the alleged fugitive, they haven't pursed a search warrant at this particular stage. That was probably their intent is that they were going to get a search warrant. In the interim the owners of the [home come up]. There's confrontation, but then there's permission to go ahead and search the [home]. So, I mean, why are we dancing around what happened with this green truck when the issue is basically something that occurred in front of the house, not behind [the house] with the truck? It occurred when the owners of the [home came upon] their property and saw police officers there. That's basically where everything gets started. Because the officer says here's why we're here, this is what we think. And, you know, at least one owner, Mrs. Smith, from the testimony we've heard at this particular point, objected to the officer's presence and, you know, then it kind of just fell apart until everyone got control of their senses. And you know, then they allowed a search of their house.

But, you know, they went up to one property where they had information. You know, I think officers are entitled, if they get information that someone had been seen at a particular place, they have a right to go in and make an investigation. The only intrusion is that they drove up a driveway. But if they got cause that they think there may be a fugitive out there, they have a right to do that. They don't have a right to go into a house, but they have a right to knock on a door to inquiry [sic]. And when he says no one was there and as they're going down the hill they see a truck that's, I'm assuming is green in color and is a pickup truck. And that's the information they were given where this alleged

> fugitive had been seen driving a green pickup truck. Not saying it's the same one, but they got information and it's parked down at the house below where it had been seen earlier.
>
> You know, I don't have a problem with the officers going in to investigate that. I think that's what police are supposed to do.

Plaintiffs' counsel apparently felt - and still feels - that the allegedly insufficient or disputable information about the identification of the truck means that there was not probable cause for the disputable information about the identification of the truck means that there was not probable cause for the deputies to question Mrs. Smith about her son's whereabouts. Although the conduct and out come or Mrs. Smith's trial in the Nelson GDC is not properly before this Court, it is clear that the circumstances warranted questioning Mrs. Smith. The record reveals the following undisputed facts: Reier was wanted on outstanding warrants; Reier is Mrs. Smith's son; officers had received information that Reier had been seen in the area driving a green Dodge pickup truck; there was a green Dodge pickup truck on the Smiths' property, parked behind the cabin; and the green Dodge pickup truck had been moved from where it had been parked the previous evening. As for Mrs. Smith's conviction. which she did not appeal, the record suggests that, knowing that her son was a fugitive from justice, she did, in fact, engage in conduct sufficient to that very least, at the deputies' presence on her property, and that she physically attempted to prevent Deputy McCarthy from looking into her van windows, which are darkly tinted, but which may have been open. Additionally, the instant Complaint states that, when McCarthy inquired "whether [Mrs. Smith] would consent to a search of the cabin in which she and her husband lived," Mrs. Smith "told [McCarthy] to wait until her husband arrived." Then,

> McCarthy declared that he was going to search the van to which plaintiff replied "No, you're not." McCarthy began moving toward the sliding door on

> the side on plaintiff Donna Smith's van. **She maneuvered her body so as to place the same between McCarthy and the van's door with her back to McCarthy and her arms spread- eagled across the side of the van in a protective position.**

(Emphasis added.)

[7] Mr. Smith's testimony in the Nelson GDC does not indicate that he was maced. Mrs. Smith's testimony suggested that their dog was maced.

[8] The letter, which was attached to the Complaint as Exhibit D, asks for the names of the deputies who had been at the residence the night before the arrest. Plaintiffs claim that those deputies may have had knowledge that the truck located on the premises was registered to a Maryland man and not to Mrs. Smith's son, an issue which Plaintiffs claim is relevant to a determination of probable cause for the deputies to be on their premises February 16, 2006.

[9] There are no allegations that the Plaintiffs ever brought this issue to the attention of the trial judge, and the record does not reflect that the matter was ever raised in the Nelson GDC.

[10] The Court notes again that Tyler represented Plaintiffs in the Nelson GDC and also represents them in the instant action.

[11] In their Memorandum in Opposition to Motion to Dismiss Pursuant to Fed. R. Cic. P. 12(b)(1) and 12(b)(6), Plaintiffs concede that their claims under 42 U.S.C.s § 1981 should have been edited out before the complaint was filed...."

[12] In their Motions to Dismiss, Defendants address only § 1995(3), and the Motion to Dismiss (docket nos. 28 & 29) filed by the "State Defendants" asserts that § 1985(3) is "the subsection seemingly most pertinent to Plaintiffs" allegations." However, it is my opinion that the Complaint

could be construed to assert a claim under the first portion of § 1985(3) and the second clause of §1985(2).

The first portion of §1985(3), which actually contains two separate clauses, reads as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises or another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of prevention or hindering the constituted authorities of any State or Territory from gibing or securing to all persons within such State or Territory the equal protection of the laws....

The second portion of 42 U.S.C. § 1985(2) applies to conspiracies to obstruct the course of justice in state court, providing that,

> if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws....

The other portions of § 1985 "relate to institutions and processes of the federal government - federal officers, § 1985(1); federal judicial proceedings, the first portion of § 1985(2); and federal elections, the second part of § 1985(3)." *Kush v. Rutledge*, 460 U.S. 719, 724 (1983). It is clear that those portions of § 1985 cannot be implicated in the instant action.

[13] In their response opposing the Motions to Dismiss, Plaintiffs state, "Some defendants claim that Section 1985 envisages only racially motivated conspiracies but surely the

Smiths as white people are also entitled to the equal protection of the law."

[14] In their Motion to Dismiss (docket nos. 30 & 31), the Nelson County Sheriff's Department Defendants incorrectly state that, when determining the accrual of §1983 claims, a federal court applies state law.

[15] Plaintiffs have no standing to request the prosecution of Defendants McCarthy and Bridgwater. *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("a private citizen lacks a judicially cognizable interest in the prosecution or non prosecution of another"). As such, any claim based on this argument must be dismissed. Even assuming the Office of the Attorney General has any authority to initiate prosecution, Attorney General McDonnell and Assistant Attorney General Dion cannot be sued based upon absolute prosecutorial immunity. A prosecutor is immune from liability for his or her decision not to prosecute. see *Imbler v. Pachtman*, 424 U.S. 409 (1976).

[16] To the extent the Complaint could be construed as claiming that Governor Kaine and Attorney General McDonnell violated Plaintiffs' constitutional rights by failing in their "joint and several duty . . . to fully and impartially investigate the matters referred to them," Plaintiffs are advised that state law does not provide and independently actionable claim under § 1983. *See, e.g., Riccio v. County of Fairfax, Va.*, 907 F.2d 1459,1469 (4th Cir. 1990) (finding that state official's failure to abide by state law as to procedural protections is not a federal due process issue). "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the *Constitution and laws of the United States*, and must show that the alleged deprivation was committed by a person action under color of state law." *West v. Atkins*, 487 U.S, 42, 48 (1988) (citation omitted, emphasis added). To the extent the instant complaint could be liberally construed to implicate some claim available to Plaintiffs under state law, the court declines to exercise supplemental jurisdiction over such claims, pursuant to 28 U.S.C. § 1367(c)(3), which provides

that "district courts may decline to exercise supplemental jurisdiction over a claim. . . if . . . the district court has dismissed all claims over which it has original jurisdiction . . . ."

[17] The Court's rationale in *Briscoe* suggests that its ruling bars not only civil claims for perjury, but also civil claims related to perjury, such as Plaintiffs' allegations that Defendants "fixed and coordinated their testimony before trial." To bar a Plaintiff from bringing a claim for perjury, but to allow a civil action for preparing for perjury, would circumvent this immunity and would result in exactly the sort of substantial burden on law enforcement officers that concerned the Court in *Briscoe*. 460 U.S. at 330-44. Here, However, the Court discerns that Plaintiffs' allegations that Defendants "fixed and coordinated their testimony before trial" fall within Plaintiffs' § 1983 conspiracy claims, and will address those claims herein as such.

[18] To recapitulate, the complaint alleges that Plaintiffs' counsel asked Payne (the Commonwealth's Attorney) and Deputy Dixon to provide him with any exculpatory evidence, which they allegedly failed to do. Payne provided counsel with documents discussed earlier in this opinion; these documents are also submitted as Exhibits B and C to the complaint. Exhibit D to the complaint, an letter to Dixon from counsel dated July 25, 2006, asks Dixon to provide counsel with evidence that would indicate Reier was in the house and had escaped during the commotion; that evidence is provided in Exhibit B, which indicates that, through a large gap under a door, McCarthy and Bridgewater saw a shadow move in the house, suggesting a person's presence therein. Plaintiffs also had the opportunity to subpoena and call Dixon at the trial and question him. Significantly, Exhibit D also requests the names of the deputies who had been at the residence the night before Mrs. Smith's arrest, and this is the information that, in Plaintiffs' view, constitutes "exculpatory" evidence.

[19] The district court was affirmed by Judge Wilkinson's Opinion, which was designated a concurring opinion, joined

by Judges Widener, Wilkins, Niemeyer, William, and Traxler.

[20] The Court reiterates the following undisputed facts: a *capias* had been issues for Reier; Reier is Mrs. Smith's son; officers had received information that Reier had been seen in the area driving a green truck; there was a green Dodge pickup truck on the Smiths' property; and the truck had been moved from where it was parked the previous evening.

[21] Plaintiffs are advised that the Fourth Circut has mad it "clear that there is no such thing as a '§ 1983 malicious prosecution' claim." *Lambert v. Williams*, 223 F.3d 257, 262 (4th Cir. 2000) (citing *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996). "[A] § 1983 claim grounded in the Fourth Amendment" does "not leave open, under the guise of malicious prosecution, constitutional claims barred by *res judicata*." *Id.* at 262-63. *See also Heck v. Humphrey*, 512 U.S. 477, 483-84 (1994) (finding legality of confinement claim analogous to false arrest and malicious prosecution torts, and incorporating into the federal claim the common law prerequisite of termination of the prior criminal proceeding in favor of the accused). Here, it appears that the crux of Plaintiffs Complaint is that the prior criminal proceeding did not terminate in Mrs. Smith's favor.

[22] Virginia law also provides that state prosecutors are absolutely immune for their prosecutorial duties associated with the judicial phase of criminal process.*Andrew v. Ring*, 266 Va. 311, 320-21 (2003)

[23] The transcript of the trial before the Nelson GDC indicates that, regarding the conduct with which Mrs. Smith was charged, the testimony of Deputies Bridgewater and McCarthy is consistent with the factual allegations in Plaintiffs' instant Complaint.

[24] Rule 7C:5 applies "to the prosecution for a misdemeanor which may be punished by confinement in jail," as in the Smith's case. Va. Sup. Ct. Rule 7C:5(a).

APPENDIX C--COMPLAINT OF DON W. SMITH AND DONNA L. SMITH FILED UNDER SECTION 1983 OF TITLE 42 OF THE UNITED STATES CODE FILED ON AUGUST 1, 2008 IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE DIVISION

DON W. SMITH
and
DONNA L. SMITH, COMPLAINT
Plaintiffs,
v.

MICHAEL R. MCCARTHY, in his individual capacity and in his capacity as a Nelson County Deputy Sheriff,
MALCOLM E. BRIDGWATER, in his individual capacity and in his capacity as a Nelson County Deputy Sheriff.
JOHN M. DIXON, II, in his individual capacity and in his capacity as a past Nelson County Deputy Sheriff.
GARY L. BRANTLEY, in his individual capacity and in his past capacity as Nelson County Sheriff.
PHILLIP D. PAYNE, IV, in his individual capacity and in his capacity as Nelson County Commonwealth's Attorney.
JOSEPH L. RADER, in his individual capacity and in his capacity as a Virginia State Police Lieutenant.
SHANNON Y. DION , in her individual capacity

and in her capacity as a Virginia Assistant Attorney General.
ROBERT F. McDONNELL, in his individual capacity and in his capacity as the Attorney General of the Commonwealth of Virginia.
TIMOTHY M. KAINE, in his individual capacity and in his capacity as Governor of the Commonwealth of Virginia.
COMMONWEALTH OF VIRGINIA, by and through her duly established DEPARTMENT OF STATE POLICE.
UNKNOWN DEFENDANTS, in their individual capacities and in their capacities as employees of the Virginia State Police, the Attorney General and/or the Governor.

Defendants.

JURISDICTION

1. This action arises under the Constitution of the United States, particularly the Fourth, Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States and under federal law, including without limitation, Sections 1981,1983, and 1985 of Title 42 of the United States Code.

PARTIES

2. Plaintiffs, Don W. Smith, hereinafter "Don Smith", and Donna L. Smith, hereinafter "Donna Smith", are citizens of the United States of America and residents of the County of Nelson, Virginia.

3. Defendants Michael R. McCarthy (hereinafter "McCarthy") and Malcolm E. Bridgwater (hereinafter "Bridgwater") are now, and at all times herein mentioned were duly appointed,

employed, and acting deputy sheriffs of the County of Nelson, Virginia, and are also residents of said county.

4. Defendant John M. Dixon, II (hereinafter "Dixon") was at all times herein mentioned a duly appointed, employed, and acting deputy sheriff of the County of Nelson, Virginia, with the rank of Captain, and is also a resident of said county. Gary L. Brantley (hereinafter "Brantley") was at all times herein mentioned the duly elected, employed, and acting sheriff of the County of Nelson, Virginia, and is also a resident of said county.

5. Defendant Phillip D. Payne, IV, is now, and was at all times herein mentioned the duly elected, employed, and acting Commonwealth's Attorney of the County of Nelson, Virginia, and is also a resident of said county.

6. Defendant Joseph L. Rader is now, and was at all times herein mentioned a Lieutenant in the Virginia State Police.

7. Defendant Shannon Y. Dion (hereinafter "Dion") is now, and was at all times herein mentioned a duly appointed, employed, and acting Assistant Attorney General of Virginia employed in the Special Prosecutions and Organized Crime Section of the Attorney General's Office and represents the Department of State Police and the Department of Criminal Justice Services. Defendant Robert F. McDonnell (hereinafter "McDonnell") was at all times herein mentioned the duly elected, employed, and acting Attorney General of the

Commonwealth of Virginia. Defendant Timothy M. Kaine (hereinafter "Kaine") was at all times herein mentioned the duly elected Governor of the Commonwealth of Virginia. The Commonwealth of Virginia and the Department of State Police are joined herein as defendants because both are liable for the actions of defendants Rader, Dion, McDonnell, Kaine and any defendants unknown at this time.

8. There are OTHER DEFENDANTS UNKNOWN at this time, who are employed in the Virginia State Police, the Office of the Attorney General and the Office of the Governor and plaintiffs reserve the right to join such other defendants as discovery may reveal to the Second Count of this complaint.

FACTS COMMON TO BOTH COUNTS

9. Don Smith and Donna Smith have been married for over thirty (30) years and are joint owners of approximately nine (9) acres, more or less, with improvements, situate in Nelson County, Virginia, the improvements including a house which sits up on a hill overlooking two (2) cabins, wiith postal address of 2621 Greenfield Road, Afton, Virginia 22920. At all times herein mentioned, plaintiffs lived in the larger cabin, their son, Donavon, lived in the smaller cabin and no one was living in the house on the hill which was undergoing renovations. None of the improvements or the ground surrounding are visible from Greenfield Road.

10. Donna Smith is the mother of one David Reier who is the stepson of Don Smith.

11. On the night of February 15, 2006, two (2) deputies of the Nelson County Sheriff's Department drove their marked cruiser by the lower cabin in which the Smiths resided to the house up on the hill. Donna Smith left her house and followed them up the hill to inquire what business they had on her and her husband's property. They informed her that they had an arrest warrant or capias for her son, David Reier, and inquired whether she knew where he was. She replied that she did not.

12. At that time, a green pickup truck, bearing Maryland plates, was parked by the house and said deputies radioed the vehicle identification number and/or the plates into dispatch in Lovingston. After receiving a determination from dispatch that David Reier was not the owner of the vehicle, they asked plaintiff Donna Smith's consent to search the house on the hill to which search she consented. After a search of the same, which was vacant, the deputies left the premises, having "cleared" the property with dispatch in Lovingston as far as David Reier was concerned.

13. On the morning of February 16, 2006, plaintiffs drove to Whitesell's Service in Waynesboro to pick up their son Donavon's repaired motor vehicle.

14. In their absence, defendant McCarthy, followed by defendant Bridgewater, without any cause or legal justification whatsoever, entered onto

plaintiffs' property, and illegally conducted a full outside premises search and building and vehicle searches including the interior of Donavon's cabin, the interior of the pickup truck and its glove compartment as well as Don Smith's parents' camp trailer. Upon information and belief, they or one of them entered into and searched the Smiths' personal residence, the other cabin, whose doors were unlocked. This willful, wanton and reckless disregard of plaintiffs' rights to live in and enjoy their property free from all unwarranted, governmental intrusion as may be and are guaranteed by the law, including common law, and the constitutions of the Commonwealth of Virginia and the United States of America is the subject of the First Count of a complaint for personal injuries pending in Nelson County Circuit Court *sub nom Don W. Smith and Donna L. Smith v. Michael R. McCarthy*, Docket No.CL08000063.

15. When Donna Smith returned home, defendant McCarthy was parked on her driveway and blocked the path of her van which she brought to a stop. McCarthy, after asking her questions in an arrogant, highly suspicious, intemperate and high-handed fashion, demanded that she get out of her vehicle to which demand, faced with McCarthy's demeanor, she complied.

16. Defendant McCarthy asked at least three (3) times whether she would consent to a search of the cabin in which she and her husband lived, and three times she told him to wait until her husband arrived.

17. Defendant McCarthy then declared that he was going to search the van to which plaintiff replied "No, you're not." McCarthy began moving toward the sliding door on the side on Plaintiff Donna Smith's van. She maneuvered her body so as to place the same between McCarthy and the van's door with her back to McCarthy and her arms spread-eagled across the side of the van in a protective position.

18. Without any warning whatsoever, McCarthy blindsided Donna Smith by smashing her head into the van which "dropped" her into a ditch whereupon he brutally handcuffed her and, in spite of her pleas to just give her time to regain her balance, yanked her to her feet by the handcuffs, causing her wrists to bleed.

19. Plaintiff Don Smith, who had arrived back from Waynesboro, did not see the smashing of his wife's head but upon seeing its aftermath, rushed to the aid of his wife, pleading with McCarthy as he did so to leave his wife alone, warning him of her heart condition, and grabbed McCarthy's shirt to in an attempt to get McCarthy off his wife. McCarthy maced him and Bridgwater, pointing a loaded revolver between his eyes, ordered him to the ground. After he quickly complied, both deputies jumped on top of him and handcuffed him. Don Smith was placed in the back seat of McCarthy's cruiser and plaintiff Donna Smith was placed in the front seat of her van.

20. Both plaintiffs were subdued by McCarthy and Bridgwater as aforesaid at sometime between

10:00 a.m. and 10:30 a.m. on the morning of February 16, 2006, and according to the dispatch records, McCarthy and Bridgwater left the property at approximately 11:30 a.m. after McCarthy required each to sign a promise to appear in Nelson County General District Court on a summons issued them by defendant McCarthy charging each of them with obstruction of justice. True copies of the summonses are attached hereto as Exhibits "A-1" and "A-2."

21. After plaintiffs were arrested as described above, defendants Dixon and Brantley arrived at the scene and all four defendants conferred at times as an entire group and at times in smaller groups out of the earshot of plaintiffs and appeared at times to be talking on cell phones. Soon after his arrival, Dixon ordered Bridgwater and McCarthy to uncuff plaintiffs. Before Bridgwater and McCarthy left the property, Don Smith accompanied Bridgwater to the door of their cabin to demonstrate that the door was unlocked. Bridgwater then declined Smith's invitation to search the cabin. The cabin was never legally searched by any of the defendants appearing on the scene that day.

22. Plaintiffs retained Bruce K. Tyler (hereinafter "Tyler") to represent them in defending the obstruction of justice charges and trial was originally scheduled for trial on May 10, 2006, at which time plaintiffs and their attorney appeared and consented to a continuance of the case until August 2, 2006, at the request of defendant Payne. At the time he made the request, defendant Payne offered Tyler unsolicited copies of a certain

"Confidential Supplement", attached hereto as Exhibit "B", and the dispatch records of February 16, 2006, attached hereto as Exhibit "C", and Tyler accepted the same.

23. Approximately one week before the trial, Tyler mailed letters dated July 25, 2006, true copies of which are attached hereto as Exhibit "D", to defendants Payne and Dixon, in which Tyler, for all practical intents and purposes, requested exculpatory evidence and stated plainly the Smiths' defense to the charges.

24. The first of the two issues of the trial germane to establishing the Smiths' defense to the charges was whether defendants McCarthy and Bridgwater had legal justification for entering plaintiffs' property. That issue would be decided on the basis of what knowledge or information defendants McCarthy and Bridgwater were acting upon when they entered the property from Greenfield Road. The second issue of the trial and just as germane to the Smiths' defense, and directly relevant to the first issue, was McCarthy's and Bridgwater's knowledge or information as to the ownership or possession or control of the green Dodge pickup truck by David Reier.

25. The trial was transcribed by a certified court reporter. At no time before the commencement of the trial on August 2, 2008, did Tyler receive the requested evidence or information requested in the letters constituting Exhibit "D". David Reier did not then nor has he ever owned a motor vehicle. Moreover, the dispatch records of the morning in

question, Exhibit "C", clearly demonstrate that one State Trooper Birckhead radioed a report relayed to him by a citizen at Graves Grocery as to David Reier's whereabouts, that each of defendants McCarthy and Bridgwater were out on the road in his own cruiser and that McCarthy did not radio in a request for a VIN identification of the pickup truck. Yet on these issues of probable cause and identification of the truck, defendant Bridgwater testifed under oath, inter alia, in the following particulars:

a. "I was at the sheriff's office when one of the dispatchers motioned for me to come in dispatch...They received a citizen tip on that he was in the Greenfield area and was driving a green Dodge pickup truck...The subject's name was David Reier." (Trans. p. 5).

b. "But we had gotten information from the night before that he wasn't living there (white house on hill), he was living in the second residence which in on the foot of the hill. A little log cabin there." (Trans. p. 6).

c. "Well, the Smiths because we knew that's where David Reier lived...I received information from other officers here in the sheriff's office. They had been pursuing Mr. Reier the day before." (Trans. pp. 14-15).

d. In response to the court's questions about content of anonymous tip as to license plate tag or anything else besides color and type of vehicle, "And

the fact that they had seen Mr. Reier driving. That was the information that I received." (Trans. p. 35). And yet again, on these issues of probable cause and identification of the truck, defendant McCarthy testifed under oath, inter alia, in the following particulars:

a. "We had received a tip in dispatch from a wanted person, David Reier, was at a house over in Afton off of Greenfield Road. Just did some background real quick, information that apparently the deputies from the night before had been up to this house." (Trans. p. 36).

b. "Well, as I said, the officers the night before had seen David Reier's vehicle, his truck, up at the top. Which is where we went to." (Trans. p. 44).

c. "Based on that his truck had been there and that he had been seen, he might be there." (Trans. p. 46).

d. "So we went to the house and found the truck behind it. I ran the tags and it was, as I recall, it's registered to David Reier. I don't know if it was the tags or if I ran the VIN number, but it was his truck." (Trans. p. 37).

e. "So we went to the house and found the truck behind it. I ran the tags and it was, as I recall, it's registered to David Reier. I don't know if it was the tags or if I ran the VIN number, but it was his truck." (Trans. p. 37).

f. "Tags had been removed from the truck. I believe I ran the VIN number off of the vehicle. Called in the VIN number." (Trans. p. 42).

g. "I wrote down the VIN number...I go back to my vehicle, call in the VIN number." (Trans. p. 50).

h. In response to who told defendant McCarthy that Reier's truck was found on the property, somebody " in dispatch or one of the deputies" did. (Trans. p.47). There are numerous other statements made under oath by McCarthy which directly contradict what is shown by aforesaid records. In addition, both defendants testified untruthfully on every other material issue tending to prove plaintiffs' innocence.

26. After both defendants testified, Joseph M. Serkes, the judge of Nelson County General District Court, granted plaintiffs' attorney Tyler's motion to strike the Commonwealth's evidence as to plaintiff Don Smith and the charge against plaintiff Don Smith was dismissed.

27. After both plaintiffs and their witnesses testified, which testimony was truthful, consistent, believable and hardly effectively cross examined, and which testimony was, in all material aspects of the prosecution, contrary to the untruthful testimony presented by the Commonwealth, Judge Serkes found plaintiff Donna L. Smith guilty of obstruction of justice and sentenced her to a suspended jail sentence of thirty (30) days and fined her $250.

FIRST COUNT

28. Plaintiffs repeat and reallege the allegations of paragraphs 8 through 28 of this complaint as is set forth fully and at length.

29. Soon after the attack on Donna Smith and the arrest of plaintiffs and continuing until August 2, 2006, defendants McCarthy, Bridgwater, Dixon, Brantley and Payne, individually and in concert with each other, willfully, knowingly, and with specific intent to deprive plaintiffs of their rights hereinafter described, agreed, combined and conspired to seek the conviction of plaintiffs for obstruction of justice which was the objective of the conspiracy. Defendants sought such convictions not only to justify McCarthy's unprovoked attack but to interpose them as affirmative defenses to any personal injury claims arising from the illegal entry onto the Smiths' property, the attack of defendant McCarthy upon Donna Smith, her arrest, and the assault upon, and the arrest of Don Smith by defendant Bridgwater which plaintiffs might file as a result of that day's events. And in fact, defendant McCarthy has pleaded the conviction of Donna Smith as an affirmative defense in a pending Nelson County Circuit Court complaint for personal injuries for trespass, assault and battery and malicious prosecution *sub nom Don W. Smith and Donna L. Smith v. Michael R. McCarthy, Docket No. CL08000063*.

30. In furtherance of the conspiracy which attained its objective as to Donna Smith by her conviction of August 2, 2006, said defendants, individually and in concert with each other, did

maliciously and without legal cause, justification or excuse, with intent to injure, oppress, threaten, and intimidate plaintiffs in the exercise of their constitutional and federal statutory rights described below (1) issue aforesaid summonses to the Smiths accusing them of fabricated charges of obstruction of justice, a Class I misdemeanor; (2) provided the Smiths before trial, in an attempt to induce them to plead guilty to the fabricated charges, with unsolicited evidence showing gratuitous self-serving additions to the dispatch notes, Exhibit "C", the additions being made well after defendants McCarthy and Bridgwater had departed the Smith property; (3) provided the Smiths before trial, in an attempt to induce them to plead guilty to the fabricated charges, with the fabrication of an "official" version of the events suggesting that Donna Smith was a felon guilty of harboring a fugitive and that she created the disturbance with McCarthy so as to divert attention from David Reier's imaginary escape, all as highly suggested in the Confidential Supplement, Exhibit "B" and strongly implied in the Nelson County General District Court's finding of Donna Smith's guilt; (4) fixed and coordinated their testimony before trial so that it would tend to support the fabricated "official" version; (4) failed to provide plaintiffs with evidence before trial, as they were required to do, of the "clearing" of the Smiths' property for the presence of David Reier on the night before by the two (2) deputies; (5) presented untruthful testimony to the court on the issues of probable cause and identification of the truck as more fully detailed above and (6) presented untruthful testimony at trial on all other material issues of the case.

31. Each of defendants McCarthy, Bridgwater, Dixon, Brantley and Payne, individually and in concert with each other, acted without authorization of law, under pretense and color of law and in his official capacity, with the specific intent to deprive plaintiffs of their rights (1) to freedom from illegal searches and seizure of their persons and property; (2) to freedom from unlawful arrest, detention and imprisonment; (3) not to be deprived of life, liberty, or property without due process of law; (4) not to be falsely "criminalized" by state officers in order to protect a criminal state officer(s); (5) to defend themselves as criminally accused persons; (6) as victims of crime to the protection of police officers, the courts and the law and to have the wrongdoers duly prosecuted and punished and (7) not to be deprived of any and all further rights guaranteed them by the Constitution of the United States, the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States, Sections 1981,1983 and 1985 of Title 42 of the United States Code and any and all other federal statutes for such cases made and provided.

SECOND COUNT

32. Plaintiffs repeat and reallege the allegations of paragraphs 8 through 31 of this complaint as is set forth fully and at length.

33. After the trial was concluded, plaintiffs ordered the transcript of the trial and conferred with Tyler about an appeal of Donna Smith's conviction. Certain that fraud had been visited upon the General District Court, they decided that the

conviction would be vacated easily once the transcript and other material were referred to Payne, whose participation was not suspected at the time, and other law enforcement authorities, as Tyler was required to do as an officer of the Court. Confident that justice would be done, they declined to appeal. Accordingly, along with a letter dated February 27, 2007, a partially redacted copy of which is attached hereto as Exhibit "E", Tyler delivered by certified mail, return receipt requested, the transcript and other related material to defendant Payne and and to the Appomattox Unit of the Virginia State Police, reporting his "considered opinion" of the case.

34. After a meeting in his Afton office with defendant Rader, Tyler wrote a letter to defendant Rader dated March 22, 2007, with a copy to defendant Payne, and mailed the same, certified mail, return receipt requested, to both of them. A true copy of said letter dated March 22, 2007, is attached hereto as Exhibit "F". Defendant Payne acknowledged the receipt of the material by faxed letter dated March 29, 2007, a copy of which is attached as Exhibit "G", making no comment with respect to the matters set forth in Tyler's letter dated March 22, 2007.

35. By letter dated July 23, 2007, a true copy of which is attached hereto as Exhibit "H", defendants Payne and Rader communicated to Tyler their determination that there was no perjury nor conspiracy.

36. By letter dated September 17, 2007, a true copy of which is attached hereto as Exhibit "I", Tyler expressed his disappointment with the conclusion of Payne and Rader and informed Payne that the matter would "be referred to the next level."

37. On December 12, 2007, Tyler referred the matter to defendants Kaine and McDonnell, who received them on December 14, 2007. A true copy of Tyler's letter dated December 12, 2007, along with a "compendium" of the enclosures mailed to said defendants by certified mail, return receipt requested, are attached hereto as Exhibit "J".

38. Under Section 2.2-511 of the Code of Virginia (1950), as amended, defendant McDonnell had no authority to institute and conduct criminal prosecutions in the Nelson County Circuit Court without the "concurrence of the local attorney for the Commonwealth" unless "specifically requested by the Governor to do so." It was the joint and several duty of defendants Kaine and McDonnell, upon the receipt of the material from Tyler, to fully and impartially investigate the matters referred to them and take such action as the law and justice demanded, and under a reasonable view of the evidence presented to them, certainly not deferring to the findings of "the local attorney for the Commonwealth" and defendant Rader. Moreover, even if McDonnell were personally limited by §2.2-511 to intervene in this matter, it was incumbent upon him to urge Kaine to make the specific request contemplated by the statute, and it was incumbent upon Kaine to make that specific request even in the

absence of McDonnell's recommendation that he do so.

39. Nevertheless, in spite of said duties, defendant Shannon Y. Dion, writing on behalf of defendant McDonnell and defendant Department of State Police, and presumably on behalf of defendant Kaine, by letter dated January 14, 2008, a true copy of which is attached hereto as Exhibit "K", informed Tyler that the Office of the Attorney General was "without authority" to act.

40. Defendants Rader, Dion, attorney for the Department of State Police, McDonnell and Kaine acquiesced in, condoned and ratified the actions of defendants McCarthy, Bridgwater, Dixon, Brantley and Payne set forth in the First Count and that acquiescence, condonation and ratification continues to date, all justifying joining the Department of State Police and the Commonwealth of Virginia as defendants in this civil action and as such defendants, making them liable to plaintiffs Smith for the relief prayed for below.

DEMAND FOR JURY TRIAL

Plaintiffs Don W. Smith and Donna L. Smith hereby make demand for trial by jury on all issues of this complaint.

WHEREFORE, plaintiffs pray for relief and judgment against defendants, jointly and severally, as follows:

1. For an order striking any defense based on the void conviction of Donna Smith which may be

pleaded in any answer of defendants to this complaint;

2. For FIVE HUNDRED THOUSAND DOLLARS ($500,000) as compensatory damages;

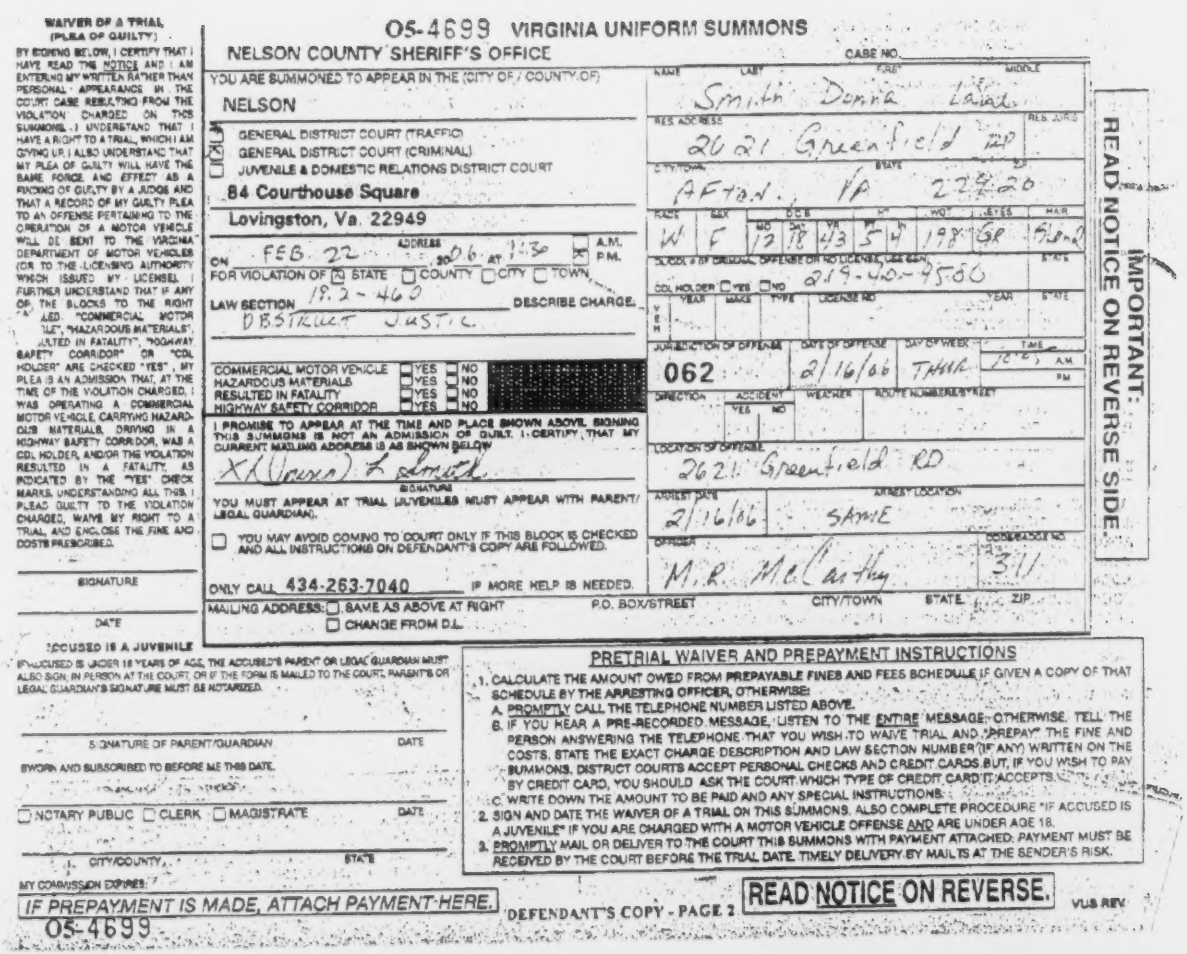
3. For THIRTY MILLION DOLLARS ($30,000,000) as punitive damages;

4. For an award of attorney fees and costs of suit;

5. For such other and further relief as the Court deems just and equitable.

DON W. SMITH
DONNA L. SMITH
OF COUNSEL

THE FOLLOWING 18 PAGES COMPRISE EXHIBITS "A" THRU "K" AS ATTACHED TO THE PRECEDING COMPLAINT.



WAIVER OF A TRIAL (PLEA OF GUILTY)

BY SIGNING BELOW, I CERTIFY THAT I HAVE READ THE NOTICE AND I AM ENTERING MY WRITTEN RATHER THAN PERSONAL APPEARANCE IN THE COURT CASE RESULTING FROM THE VIOLATION CHARGED ON THIS SUMMONS. I UNDERSTAND THAT I HAVE A RIGHT TO A TRIAL, WHICH I AM GIVING UP. I ALSO UNDERSTAND THAT MY PLEA OF GUILTY WILL HAVE THE SAME FORCE AND EFFECT AS A FINDING OF GUILTY BY A JUDGE AND THAT A RECORD OF MY GUILTY PLEA TO AN OFFENSE PERTAINING TO THE OPERATION OF A MOTOR VEHICLE WILL BE SENT TO THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES (OR TO THE LICENSING AUTHORITY WHICH ISSUED MY LICENSE). FURTHER UNDERSTAND THAT IF ANY OF THE BLOCKS TO THE RIGHT LABELED "COMMERCIAL MOTOR VEHICLE", "HAZARDOUS MATERIALS", "RESULTED IN FATALITY", "HIGHWAY SAFETY CORRIDOR" OR "CDL HOLDER" ARE CHECKED "YES", MY PLEA IS AN ADMISSION THAT, AT THE TIME OF THE VIOLATION CHARGED, I WAS OPERATING A COMMERCIAL MOTOR VEHICLE, CARRYING HAZARDOUS MATERIALS, DRIVING IN A HIGHWAY SAFETY CORRIDOR, WAS A CDL HOLDER, AND/OR THE VIOLATION RESULTED IN A FATALITY, AS INDICATED BY THE "YES" CHECK MARKS. UNDERSTANDING ALL THIS, I PLEAD GUILTY TO THE VIOLATION CHARGED, WAIVE MY RIGHT TO A TRIAL, AND ENCLOSE THE FINE AND COSTS PRESCRIBED.

SIGNATURE

DATE

ACCUSED IS A JUVENILE

IF ACCUSED IS UNDER 18 YEARS OF AGE, THE ACCUSED'S PARENT OR LEGAL GUARDIAN MUST ALSO SIGN IN PERSON AT THE COURT, OR IF THE FORM IS MAILED TO THE COURT, PARENT'S OR LEGAL GUARDIAN'S SIGNATURE MUST BE NOTARIZED.

SIGNATURE OF PARENT/GUARDIAN — DATE

SWORN AND SUBSCRIBED TO BEFORE ME THIS DATE.

☐ NOTARY PUBLIC ☐ CLERK ☐ MAGISTRATE — DATE

CITY/COUNTY — STATE

MY COMMISSION EXPIRES:

IF PREPAYMENT IS MADE, ATTACH PAYMENT HERE.

05-4699

05-4699 VIRGINIA UNIFORM SUMMONS

NELSON COUNTY SHERIFF'S OFFICE

CASE NO.

YOU ARE SUMMONED TO APPEAR IN THE (CITY OF / COUNTY OF)

NELSON

☐ GENERAL DISTRICT COURT (TRAFFIC)
☐ GENERAL DISTRICT COURT (CRIMINAL)
☐ JUVENILE & DOMESTIC RELATIONS DISTRICT COURT

84 Courthouse Square

Lovingston, Va. 22949

ADDRESS

ON FEB. 22 20 06 AT 1:30 ☒ A.M. ☐ P.M.

FOR VIOLATION OF ☒ STATE ☐ COUNTY ☐ CITY ☐ TOWN

LAW SECTION 18.2-460 DESCRIBE CHARGE. DISTRICT JUSTICE

COMMERCIAL MOTOR VEHICLE	☐ YES	☐ NO
HAZARDOUS MATERIALS	☐ YES	☐ NO
RESULTED IN FATALITY	☐ YES	☐ NO
HIGHWAY SAFETY CORRIDOR	☐ YES	☐ NO

I PROMISE TO APPEAR AT THE TIME AND PLACE SHOWN ABOVE. SIGNING THIS SUMMONS IS NOT AN ADMISSION OF GUILT. I CERTIFY, THAT MY CURRENT MAILING ADDRESS IS AS SHOWN BELOW

X (Donna) L Smith

SIGNATURE

YOU MUST APPEAR AT TRIAL. JUVENILES MUST APPEAR WITH PARENT/LEGAL GUARDIAN).

☐ YOU MAY AVOID COMING TO COURT ONLY IF THIS BLOCK IS CHECKED AND ALL INSTRUCTIONS ON DEFENDANT'S COPY ARE FOLLOWED.

ONLY CALL 434-263-7040 IF MORE HELP IS NEEDED.

MAILING ADDRESS: ☐ SAME AS ABOVE AT RIGHT ☐ CHANGE FROM D.L. — P.O. BOX/STREET — CITY/TOWN — STATE — ZIP

NAME: LAST Smith FIRST Donna MIDDLE Lasal

RES. ADDRESS: 2621 Greenfield RD — RES. JURIS.

CITY/TOWN: Afton STATE: VA ZIP: 22920

RACE	SEX	DOB	HT	WGT	EYES	HAIR
W	F	12/18/43	5'4"	198	GR	Brn

SCHOOL (IF CRIMINAL OFFENSE OR NO LICENSE) — DLN — STATE

CDL HOLDER ☐ YES ☐ NO — 219-40-9506

VEHICLE: YEAR — MAKE — TYPE — LICENSE NO — YEAR — STATE

JURISDICTION OF OFFENSE: 062 — DATE OF OFFENSE: 2/16/06 — DAY OF WEEK: THUR — TIME: 12:45 ☐ A.M. ☐ P.M.

DIRECTION — ACCIDENT ☐ YES ☐ NO — WEATHER — ROUTE NUMBER & STREET

LOCATION OF OFFENSE: 2621 Greenfield RD

ARREST DATE: 2/16/06 — ARREST LOCATION: SAME

OFFICER: M.R. McCarthy — CODE/BADGE NO.: 311

PRETRIAL WAIVER AND PREPAYMENT INSTRUCTIONS

1. CALCULATE THE AMOUNT OWED FROM PREPAYABLE FINES AND FEES SCHEDULE IF GIVEN A COPY OF THAT SCHEDULE BY THE ARRESTING OFFICER, OTHERWISE:
   A. PROMPTLY CALL THE TELEPHONE NUMBER LISTED ABOVE.
   B. IF YOU HEAR A PRE-RECORDED MESSAGE, LISTEN TO THE ENTIRE MESSAGE; OTHERWISE, TELL THE PERSON ANSWERING THE TELEPHONE THAT YOU WISH TO WAIVE TRIAL AND "PREPAY" THE FINE AND COSTS. STATE THE EXACT CHARGE DESCRIPTION AND LAW SECTION NUMBER (IF ANY) WRITTEN ON THE SUMMONS. DISTRICT COURTS ACCEPT PERSONAL CHECKS AND CREDIT CARDS BUT, IF YOU WISH TO PAY BY CREDIT CARD, YOU SHOULD ASK THE COURT WHICH TYPE OF CREDIT CARD IT ACCEPTS.
   C. WRITE DOWN THE AMOUNT TO BE PAID AND ANY SPECIAL INSTRUCTIONS.
2. SIGN AND DATE THE WAIVER OF A TRIAL ON THIS SUMMONS. ALSO COMPLETE PROCEDURE "IF ACCUSED IS A JUVENILE" IF YOU ARE CHARGED WITH A MOTOR VEHICLE OFFENSE AND ARE UNDER AGE 18.
3. PROMPTLY MAIL OR DELIVER TO THE COURT THIS SUMMONS WITH PAYMENT ATTACHED. PAYMENT MUST BE RECEIVED BY THE COURT BEFORE THE TRIAL DATE. TIMELY DELIVERY BY MAIL IS AT THE SENDER'S RISK.

IMPORTANT: READ NOTICE ON REVERSE SIDE

DEFENDANT'S COPY - PAGE 2

READ NOTICE ON REVERSE.

VUS REV.

BEST AVAILABLE COPY

05-4698 VIRGINIA UNIFORM SUMMONS

NELSON COUNTY SHERIFF'S OFFICE

CASE NO.

WAIVER OF A TRIAL (PLEA OF GUILTY)

BY SIGNING BELOW, I CERTIFY THAT I HAVE READ THE NOTICE AND I AM ENTERING MY WRITTEN RATHER THAN PERSONAL APPEARANCE IN THE COURT CASE RESULTING FROM THE VIOLATION CHARGED ON THIS SUMMONS. I UNDERSTAND THAT I HAVE A RIGHT TO A TRIAL, WHICH I AM GIVING UP. I ALSO UNDERSTAND THAT MY PLEA OF GUILTY WILL HAVE THE SAME FORCE AND EFFECT AS A FINDING OF GUILTY BY A JUDGE AND THAT A RECORD OF MY GUILTY PLEA TO AN OFFENSE PERTAINING TO THE OPERATION OF A MOTOR VEHICLE WILL BE SENT TO THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES (OR TO THE LICENSING AUTHORITY WHICH ISSUED MY LICENSE). I FURTHER UNDERSTAND THAT IF ANY OF THE BLOCKS TO THE RIGHT LABELED "COMMERCIAL MOTOR VEHICLE", "HAZARDOUS MATERIALS", "RESULTED IN FATALITY", "HIGHWAY SAFETY CORRIDOR" OR "CDL HOLDER" ARE CHECKED "YES", MY PLEA IS AN ADMISSION THAT, AT THE TIME OF THE VIOLATION CHARGED, I WAS OPERATING A COMMERCIAL MOTOR VEHICLE, CARRYING HAZARDOUS MATERIALS, DRIVING IN A HIGHWAY SAFETY CORRIDOR, WAS A CDL HOLDER, AND/OR THE VIOLATION RESULTED IN A FATALITY, AS INDICATED BY THE "YES" CHECK MARKS. UNDERSTANDING ALL THIS, I PLEAD GUILTY TO THE VIOLATION CHARGED, WAIVE MY RIGHT TO A TRIAL AND ENCLOSE THE FINE AND COSTS PRESCRIBED.

SIGNATURE

DATE

ACCUSED IS A JUVENILE

IF ACCUSED IS UNDER 18 YEARS OF AGE, THE ACCUSED'S PARENT OR LEGAL GUARDIAN MUST ALSO SIGN. IF PERSON AT THE COURT, OR IF THE FORM IS MAILED TO THE COURT, PARENT'S OR LEGAL GUARDIAN'S SIGNATURE MUST BE NOTARIZED.

SIGNATURE OF PARENT/GUARDIAN — DATE

SWORN AND SUBSCRIBED TO BEFORE ME THIS DATE

☐ NOTARY PUBLIC ☐ CLERK ☐ MAGISTRATE — DATE

CITY/COUNTY — STATE

MY COMMISSION EXPIRES

YOU ARE SUMMONED TO APPEAR IN THE (CITY OF / COUNTY OF)

NELSON

☒ GENERAL DISTRICT COURT (TRAFFIC)
☐ GENERAL DISTRICT COURT (CRIMINAL)
☐ JUVENILE & DOMESTIC RELATIONS DISTRICT COURT

84 Courthouse Square

Lovingston, Va. 22949

ON FEB. 22 ADDRESS 2006 AT 1:30 ☐ A.M. ☒ P.M.

FOR VIOLATION OF ☒ STATE ☐ COUNTY ☐ CITY ☐ TOWN

LAW SECTION 18.2-460 DESCRIBE CHARGE: OBSTRUCT JUSTIC

COMMERCIAL MOTOR VEHICLE	☐ YES	☐ NO
HAZARDOUS MATERIALS	☐ YES	☐ NO
RESULTED IN FATALITY	☐ YES	☐ NO
HIGHWAY SAFETY CORRIDOR	☐ YES	☐ NO

I PROMISE TO APPEAR AT THE TIME AND PLACE SHOWN ABOVE. SIGNING THIS SUMMONS IS NOT AN ADMISSION OF GUILT. I CERTIFY THAT MY CURRENT MAILING ADDRESS IS AS SHOWN BELOW

Allen W. Smith
SIGNATURE

YOU MUST APPEAR AT TRIAL (JUVENILES MUST APPEAR WITH PARENT/LEGAL GUARDIAN).

☐ YOU MAY AVOID COMING TO COURT ONLY IF THIS BLOCK IS CHECKED AND ALL INSTRUCTIONS ON DEFENDANT'S COPY ARE FOLLOWED.

ONLY CALL 434-263-7040 IF MORE HELP IS NEEDED.

MAILING ADDRESS: ☐ SAME AS ABOVE AT RIGHT ☐ CHANGE FROM D.L. — P.O. BOX/STREET — CITY/TOWN — STATE — ZIP

NAME: LAST Smith FIRST Don MIDDLE W.

RES. ADDRESS: 2621 Greenfield Rd. — RES. ZIP

CITY/TOWN: Afton STATE: VA ZIP: 22920

RACE	SEX	DOB MO	DOB DAY	DOB YR	HT FT	HT IN	WGT	EYES	HAIR
W	M	01	05	51	5	10	150	BLU	BR

DRIVER'S LIC. OR SPECIAL ID NO. (OR LICENSE DATE BIRTH) — STATE: 213-54-4399

CO-HOLDER ☐ YES ☐ NO — LICENSE NO. — YEAR — STATE

VEHICLE: YEAR — MAKE — TYPE — LICENSE NO. — YEAR — STATE

JURISDICTION OF OFFENSE: 062 — DATE OF OFFENSE: 2/16/06 — DAY OF WEEK: THUR — TIME: 10:05 A.M. P.M.

DIRECTION — ACCIDENT YES NO — WEATHER — ROUTE NUMBER/STREET

LOCATION OF OFFENSE: 2621 Greenfield RD

ARREST DATE: 2/16/06 — ARREST LOCATION: SAME

OFFICER: M.R. McCarthy — BADGE/ASSIST NO.: 314

IMPORTANT: READ NOTICE ON REVERSE SIDE

PRETRIAL WAIVER AND PREPAYMENT INSTRUCTIONS

1. CALCULATE THE AMOUNT OWED FROM PREPAYABLE FINES AND FEES SCHEDULE IF GIVEN A COPY OF THAT SCHEDULE BY THE ARRESTING OFFICER, OTHERWISE:
   A. PROMPTLY CALL THE TELEPHONE NUMBER LISTED ABOVE.
   B. IF YOU HEAR A PRE-RECORDED MESSAGE, LISTEN TO THE ENTIRE MESSAGE; OTHERWISE, TELL THE PERSON ANSWERING THE TELEPHONE THAT YOU WISH TO WAIVE TRIAL AND "PREPAY" THE FINE AND COSTS. STATE THE EXACT CHARGE DESCRIPTION AND LAW SECTION NUMBER (IF ANY) WRITTEN ON THE SUMMONS. DISTRICT COURTS ACCEPT PERSONAL CHECKS AND CREDIT CARDS BUT, IF YOU WISH TO PAY BY CREDIT CARD, YOU SHOULD ASK THE COURT WHICH TYPE OF CREDIT CARD IT ACCEPTS.
   C. WRITE DOWN THE AMOUNT TO BE PAID AND ANY SPECIAL INSTRUCTIONS.
2. SIGN AND DATE THE WAIVER OF A TRIAL ON THIS SUMMONS. ALSO COMPLETE PROCEDURE "IF ACCUSED IS A JUVENILE" IF YOU ARE CHARGED WITH A MOTOR VEHICLE OFFENSE AND ARE UNDER AGE 18.
3. PROMPTLY MAIL OR DELIVER TO THE COURT THIS SUMMONS WITH PAYMENT ATTACHED. PAYMENT MUST BE RECEIVED BY THE COURT BEFORE THE TRIAL DATE. TIMELY DELIVERY BY MAIL IS AT THE SENDER'S RISK.

IF PREPAYMENT IS MADE, ATTACH PAYMENT HERE.

05-4698

DEFENDANT'S COPY - PAGE 2

READ NOTICE ON REVERSE.

VUB REV. 7-01-04

CONFIDENTIAL SUPPLEMENT

PAGE: 3
DATE: 2/16/06
INCIDENT #: 2006-1376 (2006 - 1376
OFFICER: M. R. McCARTHY
CODE: 5777
VICTIM: SOCIETY

I was given a tip at the S. O. concerning a wanted person, David Reier. Inv Bridgwater went with me to a location in Nellysford and we found nothing. I suggested that we check the residence on the warrant due to officers finding the wanted person's truck at the warrant address. We arrived the house on the hill at 2621 Greenfield Road, afton and found that the truck had been moved. As we were leaving I noted a truck behind the house at the bottom of the hill at 2621 Greenfield Road and we investigated. I determined that the truck had not long been moved to behind the house because the tires were still wet. The tags had been removed from the truck. I saw some papers in the truck and opened the door to verify ownership of the vehicle. I found papers in the truck that indicated David owned the truck. Inv Bridgwater (Mac) went to the front door and knocked while I observed the back door. There was no response from the house and Mac came to the back door. I tried the door and found it to be locked. Mac pounded on the door and both Mac and I saw a shadow move in the upstairs room. Mac called the Capt to see about obtaining a search warrant. As he got off the phone we noticed a vehicle at the end of the driveway. I went out to my car and met the vehicle as it came down the driveway.

I spoke to the driver and found it to be Donna Smith, mother to the wanted person. I explained why we were at the house and asked it we could take a look in the house for David. Donna immediately became angry and told me that she had had enough of this. I asked her again if we could look in the house and she said no. I told her that was ok, that we were going to get a search warrant and that she could not go to the house until we had been in the house. I then noticed a carpet rolled up in the back of the van and asked her if there was any one else in the vehicle. I began to walk around the van and she yelled at me that I could not look in her vehicle and to stay away. She jumped out of her vehicle came around the van and approached me in an aggressive manner. I told her "do not touch me – if you do that will be assault on a police officer and I will arrest you." I stepped backed to the van and cupped my hands around my eyes. Donna lunged at me grabbing me on my right arm and trying to push between me and the van. I told Donna that she was under arrest and put a control hold on Donna by pushing her against the van and twisting her left arm behind her back. I began to place handcuffs on her.

Donna's husband, Don Smith, had come down the driveway during the confrontation with Donna. As I was placing handcuffs on Donna, he jumped out of his vehicle and yelled at me to "get my god dammed hands off his wife." He ran up to me and grabbed me on my left arm trying to pull me away from Donna. I pushed Don back and told him not to interfere. He came back again and Mac came around the van and ordered Don to

EXHIBIT "B"

CONFIDENTIAL SUPPLEMENT

PAGE: 4
DATE: 2/16/06
INCIDENT #: 2006-1376 & 2006-1586
OFFICER: M. R. McCARTHY
CODE: 5777
VICTIM: SOCIETY

get on the ground at gun point. Don did not and Mac holstered his weapon and took Don to the ground. I completed cuffing Donna and then handcuffed Don. I told them that they were under arrest.

Capt Dixon and Sheriff Brantley arrived a short time later and talked with both Donna and Don. They gave permission to search the house. Capt Dixon indicated that there was evidence that David had been in the house and escaped during the commotion. The Smiths were released on a summons for obstruction of justice.

This report is for the arrest of Donna Smith. Please see report 2006-1386 for arrest of Don Smith.

C. D INCIDENT REPORT

R /16/200	TIME 09:27	EVENT ID 0216-001376	PHONE 434-361-1761	ESN A41	OPERATOR Lucy Hudson
	Location	Owner	City		LAT/LON

LMER : VSP-645
CATION : 54 LITTLE STONEY LN
OSS 1 : NONE
OSS 2 : NONE
TORE : WARRANT SERVICE/OFFICER

REMARKS:
9:29 Luc GRAVES GROCERY CALLED TROOPER BIRCKHEAD AND TOLD HIM DAVID REIER IS AT JESSIE GANNS OLD PLACE ON LITTLE STONEY CREEK LANE..HE IS WANTED ON CHARGES FROM ANOTHER JRISDICTION
9:41 Luc 311 AND 304 ARE CLEAR, BUT WILL BE IN THE AREA FOR AWHILE
9:55 Luc UNIT 304 CHANGED LOCATION TO 2621 GREENFIELD RD
9:55 Luc UNIT 311 CHANGED LOCATION TO 2621 GREEN
9:56 Luc BOTH UNITS ARE 1023 AT THIS LOCATION 2621 GREENFIELD ROAD
9:57 Luc UNIT 311 CHANGED LOCATION TO 2621 GREENFIELD RD
0:08 Luc 311 IS CHECKING THE HOUSE NEXT DOOR, THERE IS A VEHICLE PARKED IN THE BACK
1:36 Ric 311 ADVISED 2 ARRESTS MADE - RELEASED ON SUMMONS
2:34 Ric ((DAVUD REIER RAN OUT BACK DOOR AND GOT AWAY))
2:35 Ric ((WARRANT WAS FOR WAS: DAVID REIER))
2:36 Ric ((OTHER ARRESTS WAS FOR OBSTRUCTION OF JUSTICE))

UNITS' INFORMATION:

Unit	DISP	ENRT	ONSC	ENRTH	ONSCH	RTB	CLRD	STR_OD	END_OD	Case #
304	09:30	00:00	09:30	00:00	00:00	00:00	11:31	0	0	0216-000781
311	09:29	00:00	09:29	00:00	00:00	00:00	11:35	0	0	0216-000781

DISPATCHED	ON SCENE	CLEARED
09:29:50	09:29:55	00:00:00

DISPOSITION
AR Arrest made

EXHIBIT "C"

C D INCIDENT REPORT

E /16/200	TIME 12:58	EVENT ID 0216-001306	PHONE	ESN 541	OPERATOR Richard Folsom
	Location	Owner	City		LAT/LON

LLER : NONE
CATION : 2621 GREENFIELD RD
OSS 1 : NONE
OSS 2 : NONE
TURE : CRIME /OFFICER

MARKS:
3:01 Ric 311 AND 304 WERE ATTEMPTING TO LOCATE AND ARREST-DAVID REIER
3:01 Ric SUBJECTS PARENTS WERE CHARGED WITH OBSTRUCTION OF JUSTICE AND DAVID REIER GOT AWAY VIA BACK DOOR
3:02 Ric SUBJECTS WERE ISSUED A SUMMONS TO APPEAR IN COURT

NITS' INFORMATION:

Unit	DISP	ENRT	ONSC	ENRTN	ONSCN	RTB	CLRD	STR_OD	END_OD	Case #
11	12:58	00:00	12:58	00:00	00:00	00:00	13:01	0	0	0216-000787

DISPATCHED 00:00:00	ON SCENE 00:00:00	CLEARED 00:00:00

DISPOSITION
AR Arrest made

EXHIBIT "C" CONTINUED

2/17/06

Bruce K. Tyler
Counselor At Law
A Professional Corporation

Route 6 and C&O Railroad
Post Office Box 2
Afton, Virginia 22920
(540) 943-0932
Fax (540) 943-0720
Mobile (540) 470-6577

July 25, 2006

Phillip D. Payne, IV
Commonwealth's Attorney, County of Nelson
P.O. Box 447
Lovingston VA 22949

Re: ***Commonwealth of Virginia v. Donna L. Smith and Don W.Smith***
Trial Date and Time: August 2, 2006, 10:00 a.m.

Dear Phil:

I hope this letter finds you and yours doing well. Enclosed please find photos of Donna Smith which we intend to introduce at trial via her and two witnesses' testimony; the yellowish bruising above her eye was the result of McCarthy smashing her face into the window after she refused to consent to a search of her automobile.

McCarthy's entire presence on my clients' property was (apparently) predicated, according to his confidential supplement, "due to officers finding the wanted person's truck at the warrant address." These deputies had been on the property the night before, and after receiving consent to search from Donna, at some point, called in for an identification of the vehicle in question and it came up registered to a man in Maryland (to be further explained at trial). It is impossible for it to come up owned by Reier because there is no motor vehicle *anywhere* which is so titled. Please be so kind, if you have the time, to determine just who those deputies were and (with hope) confirm my clients' side of the story.

Of course, please do not hesitate to call me if you have any questions. Sending best and warm wishes as always, I remain

Very truly yours,

Bruce K. Tyler

/bkt
Encls.
cc: Don and Donna Smith

EXHIBIT "D"

Bruce K. Tyler
Counselor At Law
A Professional Corporation

129 Afton Depot Lane
Post Office Box 2
Afton, Virginia 22920
(540) 943 0932
Fax (540) 943 0720

July 25, 2006

Captain John Dixon
Nelson County Sheriff's Department
Lovingston VA 22949

Re: Re: ***Commonwealth of Virginia v. Donna L. Smith and Don W.Smith***
Trial Date and Time: August 2, 2006, 10:00 a.m.

Dear John:

I hope this letter finds you and yours doing well. Deputy McCarthy, in his "confidential supplement" setting forth his version of the arrests of my clients, states, "Capt Dixon indicated that there was evidence that David had been in the house and escaped during the commotion." Donna and Don are at a complete loss at what that evidence may have been so it would be most appreciated if you would give me a call to let me know what you saw or heard. Thanking you for your anticipated cooperation and sending best wishes, I remain

Very truly yours,

Bruce K. Tyler

/bkt
cc Don and Donna Smith

EXHIBIT "D" CONTINUED

Bruce K. Tyler
Counselor At Law
A Professional Corporation

129 Afton Depot Lane
Post Office Box 2
Afton, Virginia 22920
(540) 943-0932
Fax (540) 943-0720
Mobile (540) 470-6577

February 27, 2007

Phillip D. Payne, IV
Commonwealth's Attorney, County of Nelson
P.O. Box 447
Lovingston VA 22949

Lieutenant Jerry Barbour
Virginia State Police
P. O. Box 577
Appomattox, VA 24522

RE: *Commonwealth of Virginia v. Donna Smith and Donald Smith*

Gentlemen:

It is my considered opinion that members of the Nelson County Sheriff's Department conspired to cover up Deputy Michael McCarthy's malicious wounding of Donna L. Smith on February 16, 2006. The conspiracy began on that date and continued until the conclusion of the trial of Donna L. Smith for obstruction of justice on August 2, 2006. Please check DMV records (Maryland and Virginia) to determine that David Leslie Reier, SSN[redacted] who was born on[redacted] 1974, did not own the motor vehicle in question. The Maryland vehicle was owned by a man who now lives in Florida; we have his last known telephone number. If anything comes up in David's name, then the records have been fixed.

In attempts, all to no avail, to obtain this information before writing this letter, I reviewed the essential aspects of this wholly unfortunate situation with a[redacted] officer, an[redacted] and a[redacted] just to be certain that I was not out of line. While awaiting the trial of this case, I interrupted a meeting of Dixon, Brantley, McCarthy and Bridgewater in the small room between the clerk's office and the courtroom and clearly heard Dixon, who had his back to me, fixing his testimony with that of Bridgewater's regarding the "shadow in the upstairs bedroom" issue. I intervened in that conversation to remind Bridgewater that in fact the shadow was made by the cat at the bottom of the door, just as Dixon had said, when I was forcibly pushed out of the room by Dixon. This forcible ejection was witnessed by whomever[redacted] represented on that day; I have not contacted[redacted] to obtain his identity. He was a smaller man,[redacted] complexion, wearing[redacted]

I also enclose for your further information the following:

1. Letter dated July 25, 2006, to Captain John Dixon
2. Letter dated July 25, 2006, to Phillip D. Payne, IV
3. Copy of confidential supplement dated February 16, 2006
4. Copies of incident reports of Nelson County Sheriff's Office
5. Statement of Donna L. Smith
6. Copy of Donna Smith photographs introduced at trial
7. Transcript of trial of August 2, 2006

EXHIBIT "F"

ruce K. Tyler, P. C.

Phillip D. Payne, IV
Lieutenant Jerry Barbour
Page 2
February 27, 2007

There is not enough time here for me to comment on the numerous [redacted] and/or how to prove them. I'd like to but I do not see that as my function, unless asked. [redacted] Believe me, I will be overjoyed if, when I return to the country on March 12th, you inform me that I am out of line and everything I highly suspect has a rational explanation. Please feel free to contact me at that time.

Very truly yours,

Bruce K. Tyler

BKT/gm
Enclosures

EXHIBIT "E" CONTINUED

Bruce K. Tyler
Counselor At Law
A Professional Corporation

129 Afton Depot Lane
Post Office Box 2
Afton, Virginia 22920
(540) 943-0932
Fax (540) 943-0720
Mobile (540) 470-0577

March 22, 2007

Lt. Joseph A. Rader
Department of State Police
P.O. Box 577
Appomattox VA 24522

Re: Smith matter

Dear Lieutenant Rader:

Please place this letter in your file relative to your investigation in the above-captioned matter. You asked yesterday what *I* would do if the Commonwealth declined investigation into this matter. I should not have answered the question because it is irrelevant. The question is what shall the *Commonwealth* do with what she has been supplied at this juncture.

I am out, repeat, out of this matter except as a witness or where I may be helpful as a participant in the subject trial. I have expressed to you my extreme disgust when faced with this insult to the administration of justice and my personal distaste in having to perform my duty as an officer of the Court. I've known all these people for many years and it causes considerable pain to do this. I loath going to Lovingston, having become a stranger in a strange land after that day in August. And as I told you, had I not ordered a court reporter, this matter would have never come up. But I did, and it has. What was I to do? Toss the transcript?

And, as I am out of this matter except as a witness, let's look at what has been supplied the Commonwealth with total disregard of *my* opinions and testimony. A transcript of a trial in which two (2) deputies testified under oath has been delivered to the Commonwealth. The truthfulness or not of that testimony was based on communications by no less than four (4) deputies received from the dispatcher and other personnel and/or information. After a full and proper investigation of this case and a competent prosecution, no confession by either deputy would be required to convict. Judge Serkes's attempt to make the truck "irrelevant" came near the end of the perjurious testimony and was an incorrect ruling anyway. These guys lied and I daresay, if such a case were presented to a grand jury against private citizens, then indictments would quickly follow.

As far as Dixon and Brantley are concerned, I've told you all I know about them. If the two (2) deputies did all this on their watch, then that's the way it goes. If they have to reason to, then let them sweat out an investigation of the two who testified. I find it hard to believe that Brantley's protections as an elected official are also afforded his deputies. Have you even contacted the Smiths to see what may have been said by Dixon and/or

Exhibit "F"

uce K. Tyler, P. C.

Brantley on the day in question? And again, why do I need to ask this question? This is neither my investigation nor my prosecution. I would hope, if the Commonwealth chooses not to prosecute, that she would at least have the decency to recommend the charges to the United States of America. And if both my sovereigns decline action, then shame on both of them.

I stand ready, willing and able to assist the Commonwealth at your request as a witness or as a participant in the trial at issue. Thanking you for your attention to these matters and sending best wishes, I remain

Very truly yours,

Bruce K. Tyler

BKT/gm
cc: Mr. & Mrs. Don Smith
Phillip D. Payne, IV

EXHIBIT "F" CONTINUED

OFFICE OF
THE COMMONWEALTH'S ATTORNEY
NELSON COUNTY
84 COURTHOUSE SQUARE
POST OFFICE BOX 443
LOVINGSTON, VIRGINIA 22949

PHILIP D. PAYNE IV
COMMONWEALTH'S ATTORNEY

TELEPHONE (434) 263-7010
FACSIMILE (434) 263-7013
VICTIM/WITNESS PROGRAM
TELEPHONE (434) 263-7014

March 29, 2007

VIA FACSIMILE

Bruce Tyler, Esquire
Post Office Box 2
Afton, Virginia 22920

Dear Bruce:

I have received your information and correspondence regarding allegations of perjury and have reviewed the material with Lieutenant Rader.

Your patience in awaiting a further response from me is appreciated. The original of this letter has been mailed.

Yours very truly,

Phillip D. Payne, IV
Commonwealth Attorney

PDP,IV/wjc

EXHIBIT "C"

OFFICE OF
THE COMMONWEALTH'S ATTORNEY
ROCKBRIDGE COUNTY
54 COURTHOUSE SQUARE
POST OFFICE BOX 667
LEXINGTON, VIRGINIA 24450

TELEPHONE (540) 463-7810
FACSIMILE (540) 463-7814
VICTIM/WITNESS PROGRAM
TELEPHONE (540) 463-7816

July 23, 2007

Bruce Tyler, Esquire
Post Office Box 2
Afton, Virginia 22920

Dear Bruce:

Lieutenant Rader and I have carefully reviewed the circumstances surrounding your complaint that the sheriff's staff committed perjury and engaged in a conspiracy in connection with the arrest and trial of Donna L. Smith for obstruction.

My review and investigation lead me to conclude there was neither a conspiracy nor perjury.

I apologize for my delay in completing my work in this regard, but the time taken was in part due to my close attention to the factors which led to your concerns.

With kind regards, I am

Very truly yours,

Phillip D. Payne IV
Commonwealth's Attorney

PDPIV/vl

Cc: Lieutenant Joseph A. Rader
Virginia State Police

EXHIBIT "H"

Bruce K. Tyler
Counselor At Law
A Professional Corporation

129 Afton Depot Lane
Post Office Box 2
Afton, Virginia 22920
(540) 943-0932
Fax (540) 943-0720
Mobile (540) 470-6577

September 17, 2007

Phillip D. Payne, IV
Commonwealth's Attorney
84 Courthouse Square
Lovingston VA 22949

Dear Phil:

Needless to say, I was disappointed by your letter dated July 23, 2007, and, of course, the matter will be referred to the next level. But before I do that, I wanted to get your take on why there was no perjury. On the assumption that I was right about the non-existence of DMV records, that leaves irrelevance or immateriality of the testimony. In other words, Judge Serkes was correct in his ruling. As you know, I have attempted to handle this matter in a fair manner and I want to be certain I'm not missing something. Accordingly, I *beg* you to show me where I'm wrong on McCarthy's testimony who I really don't think can get through all this because of the uncertainty of the nature of Sheriff's Brantley involvement.

Phil, to be frank, I really thought you would bail out on this one. At least one Commonwealth's Attorney has told me he would have had a Special Prosecutor appointed from the get-go on the basis alone of alleged perjured testimony of one of his witnesses. Also, you're a witness in all this because of the letter I sent you prior to trial. You also advise the County and there is a civil side to all this. I, and quite a few others with whom I've consulted throughout this period, fully concur that you should step aside and have a Special Prosecutor have at it. Not that you *have to* but because the obvious conflicts of interest; the listing above is by no means exhaustive. Also, it really looks like you're trying to sweep this mess under the rug. Add that on to Bridgwater running for sheriff and your office could take a real beating from the press when and if all this comes out and plays out. You know the press thing. What did he know and when did he know it?

In any event, I'm sure you've thought all this through and would ask to get back to me and show me some authority on perjury issue. Hoping you can convince me to drop the whole matter and sending best wishes, I remain

Very truly yours,

Bruce K. Tyler

Exhibit "I"

Bruce K. Tyler
Counselor At Law
Professional Corporation

129 Afton Depot Lane
Post Office Box 2
Afton, Virginia 22920
(540) 943-0932
Fax (540) 943-0720
Mobile (540) 470-6577

December 12, 2007

The Honorable Timothy M. Kaine
Governor of the Commonwealth of Virginia
Governor's Office
State Capitol, Third (3d) Floor
Richmond VA 23219

The Honorable Robert McConnell
Attorney General of the Commonwealth of Virginia
Office of the Attorney General
900 East Main Street
Richmond VA 23219

Gentlemen:

I enclose to each of you, for appropriate investigation and prosecution, the same package of material, along with my accompanying letter, which I mailed to the Virginia State Police and my local Commonwealth's Attorney in February, 2007, designated as Part A. In Part B, I enclose copies of the correspondence which was generated as a result of that mailing. My position as an officer of the court, I trust, is abundantly clear from the enclosed material. I am compelled to add the following.

First, please be advised, with respect to the conflict of interest issue, that a [redacted] have confirmed with me, on the basis of the allegation of perjury and the transcript ***alone***, that each and every one of them would have referred the matter to a Special Prosecutor.

Second, if there has been any investigation, then the only persons who have been contacted are the accused and the records would have confirmed the Smiths' side of the story with respect to the night before. No one on the Smiths' side of this matter has ever been contacted nor have I been asked to assist. You all have my response to the first meeting where Rader began their attempt to talk me out of this. The second meeting was set up by Payne in his office within 24 hours of the arrival of my request in Lovingston for a petition to run for Commonwealth's Attorney. I hoped they recorded that meeting because the entire meeting was spent by Payne trying to explain away [redacted] an impossible thing to do, while at the same time trying to figure out whether I was going to run against him. I received his letter dated July 23, 2007, before I could suggest handing off the case to a Special Prosecutor.

The same offers of help made to Payne and Rader apply to you and I look forward to hearing from you. Wishing you both a Merry Christmas and a Happy New Year, I am

Very truly yours,

Bruce K. Tyler

BKT/gm
Enclosures
cc: Mr. & Mrs. Don Smith

EXHIBIT "J"

IN THE MATTER OF:

AN INVESTIGATION OF THE CASE OF THE COMMONWEALTH OF VIRGINIA V. DONNA L. SMITH AND DON SMITH, THE TRIAL OF THE SAME ON AUGUST 2, 2006, AND THE ANTECEDENT INCIDENTS OF THE PROSECUTION OCCURING ON FEBRUARY 15-16, 2006.

PART A

1. Letter dated February 27, 2007, to Phillip D. Payne, IV and Lt. Jerry Barbour
2. Letter dated July 25, 2006, to Captain John Dixon
3. Letter dated July 25, 2006, to Phillip D. Payne, IV
4. Copy of confidential supplement dated February 16, 2006
5. Copies of incident reports of Nelson County Sheriff's Office
6. Statement of Donna L. Smith
7. Copy of Donna Smith photographs introduced at trial
8. Transcript of trial of August 2, 2006

PART B

9. Letter dated March 22, 2007, to Lt. Joseph A. Rader
10. Letter dated July 23, 2007 from Phillip D. Payne, IV
11. Letter dated September 17, 2007 to Phillip D. Payne, IV

Tyler, P.C.
Of Counsel

EXHIBIT "J" CONTINUED

COMMONWEALTH of VIRGINIA

Office of the Attorney General

ert F. McDonnell
orney General

900 East Main Street
Richmond, Virginia 23219
804 786 2071
FAX 804 786 1991
Virginia Relay Services
800 828 1120
7 1 1

January 14, 2008

Bruce K. Tyler, Esquire
129 Afton Depot Lane
P.O. Box 2
Afton, Virginia 22920

Dear Mr. Tyler:

This Office is in receipt of your letter dated December 12, 2007. Please understand that the authority and jurisdiction of this Office are limited by statute. The Attorney General's Office functions primarily as a law firm for state government and in this capacity, advises state officials and represents various state agencies and departments.

The issues you raise involve matters subject to local authority. As you know, the *Code of Virginia* authorizes local law enforcement to investigate crimes and gives Commonwealth's Attorneys discretion in determining whether criminal prosecutions are merited. This Office stands ready to and frequently does provide assistance to localities but typically does not stand in oversight of decisions made by local and state law enforcement. It appears from the documentation you provided that the Department of State Police and a local prosecutor have already reviewed your complaints and determined that no prosecution should be initiated.

While I understand this is not the response you desire, I hope you find it helpful in explaining why this Office is without authority to act.

Respectfully,

Shannon Y. Dion

Shannon Y. Dion
Assistant Attorney General

EXHIBIT "K"

APPENDIX D--MOTION TO DISMISS FILED OCTOBER 21, 2008, OF RESPONDENTS JOSEPH L. RADER, SHANNON Y. DION, ROBERT F. MCDONNELL AND TIMOTHY M. KAINE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

DON W. SMITH, et al.,
Plaintiffs,
v. Civil Action No. 3:08cv00036

MICHAEL R. MCCARTHY, et al.,
Defendants.

DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED.R.CIV.P.12(b)(1) AND 12(b)(6)

Defendants the Commonwealth of Virginia, the Department of State Police, the Honorable Timothy M. Kaine, Governor, the Honorable Robert F. McDonnell, Attorney General, Shannon Y. Dion, Assistant Attorney General, and Joseph L. Rader, by counsel and pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, respectfully move this Court to dismiss Plaintiffs' Complaint with prejudice. Defendants rely on their Memorandum in Support of their Motion to Dismiss filed herewith.

Respectfully submitted,

THE COMMONWEALTH OF VIRGINIA.
THE DEPARTMENT OF STATE POLICE,
THE HONORABLE TIMOTHY M. KAINE,

GOVERNOR, THE HONORABLE ROBERT F. MCDONNELL, ATTORNEY, GENERAL, SHANNON Y. DION, ASSISTANT ATTORNEY GENERAL, AND JOSEPH L. RADER

By: /s/
C. Nicole Gilliam

APPENDIX E--MOTION TO DISMISS FILED OCTOBER 27, 2008 OF RESPONDENTS MICHAEL R. MCCARTHY, MALCOLM E. BRIDGWATER, JOHN M. DIXON, II, AND GARY L. BRANTLEY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

DON W. SMITH and
DONNA L. SMITH,
Plaintiffs,
v. Civil Action No. 3:08cv00036

MICHAEL R. MCCARTHY, in his individual capacity and in his capacity as a Nelson County Deputy Sheriff,
MALCOLM E. BRIDGWATER, in his individual capacity and in his capacity as a Nelson County Deputy Sheriff,
JOHN M. DIXON, II, in his individual capacity and in his capacity as a past Nelson County Deputy Sheriff,
GARY L. BRANTLEY, in his individual capacity and in his past capacity as Nelson County Sheriff, et al.,
Defendants.

MOTION TO DISMISS UNDER
RULE 12(b)(1) and (6)

The Defendants, Michael R. McCarthy, Malcolm E. Bridgwater, John M. Dixon, II and Gary L. Brantley, by counsel, move the Court to dismiss the Complaint under Rule 12(b)(1) and (6) of

the Federal Rules of Civil Procedure and in support thereof say as follows:

1. The Court lacks subject matter jurisdiction.

2. The Complaint fails to state a claim upon which relief can be granted. The defendants have filed a memorandum of law in support of this motion to dismiss.

WHEREFORE, the defendants, Michael R. McCarthy, Malcolm E. Bridgwater, John M. Dixon, II and Gary L. Brantley move the Court to dismiss this case and for such other relief as may be proper.

MICHAEL R. MCCARTHY
MALCOM E. BRIDGWATER
JOHN M. DIXON, II
GARY L. BRANTLEY
By Counsel

ST. JOHN, BOWLING, LAWRENCE
& QUAGLIANA, LLP

/s/ James M. Bowling, IV
James M. Bowling, IV

APPENDIX F--MOTION TO DISMISS FILED OCTOBER 28, 2008, OF RESPONDENT PHILLIP D. PAYNE, IV

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

DON W. SMITH, et al.,

v. Case No. 3:08-cv-00036

MICHAEL R. MCCARTHY, et al.,

DEFENDANT PAYNE'S MOTION TO DISMISS

Defendant Phillip D. Payne, IV, by counsel, moves to dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. Rule 12(b)(6) and Rule 12(b)(1), for the following reasons:

1. Defendant Payne is entitled to absolute immunity;

2. In the alternative, Plaintiffs fail to state a claim under 42 U.S.C. §1981 and §1985, as there are no allegations of a denial of equal protection or class based animus or discrimination;

3. In the alternative, Plaintiffs have failed to state a 42 U.S.C. §1983 claim as there are no allegations of personal involvement by Defendant Payne that state a cognizable claim; and

4. Plaintiffs' claims against Defendant Payne in his official capacity are barred by Eleventh Amendment immunity.

For these reasons and the additional reasons set forth in Defendant Payne's Memorandum in Support of his Motion to Dismiss, and any further

arguments made on his behalf, Defendant Payne respectfully requests that this Court dismiss the claims against him with prejudice.

PHILLIP D. PAYNE, IV
By Counsel

TIMBERLAKE, SMITH, THOMAS & MOSES, P.C.
By: /s/ Rosalie Pemberton Fessier
Rosalie Pemberton Fessier, Esquire

No. 09-1303

IN THE

Supreme Court of the United States

DON W. SMITH, *et ux.*,

Petitioners,

v.

MICHAEL R. McCARTHY,
Individually and in His Official Capacity as
Deputy Sheriff, Nelson County, Virginia, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PAYNE, McCARTHY, BRIDGWATER, DIXON AND BRANTLEY

JAMES M. BOWLING, IV
ST. JOHN, BOWLING, LAWRENCE
& QUAGLIANA, LLP
416 Park Street
Charlottesville, VA 22902
(434) 296-7138

Counsel for Respondents McCarthy, Bridgwater, Dixon and Brantley

ROSALIE PEMBERTON FESSIER
Counsel of Record
TIMBERLAKE, SMITH, THOMAS
& MOSES, P.C.
25 North Central Avenue
P.O. Box 108
Staunton, VA 24402-0108
(540) 885-1517
rfessier@tstm.com

Counsel for Respondent Payne

230711

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
REASONS FOR DENYING THE PETITION	6
A. Petitioners Fail to State Compelling Reasons to Grant a Petition for Writ of Certiorari	6
B. Petitioners Cannot Successfully Challenge the Lower Court's Decision to Consider the Criminal Trial Transcript as it Was Petitioners Who Referenced it in the Complaint, Filed it with the Court and Gave Written Notice That They Intended to Rely upon it in Responding to the Motions to Dismiss.	7
C. Petitioners Misstate the Findings of the Courts below Regarding the Applicability of the Statute of Limitations to Petitioners' Conspiracy Claim.	8
D. Petitioners' Naked Assertions of Conspiracy Are Without Factual Support and Do Not Meet the Plausibility Standard Set Forth by this Court in *Ashcroft v. Iqbal*.	9

Contents

Page

E. The Fourth Circuit Correctly Held That Respondent Payne Enjoyed Absolute Immunity for Claims of Conspiring to Present False Testimony and for Withholding Exculpatory Evidence Prior to Trial. 11

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

Cases

Ashcroft v. Iqbal,
129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) 9, 11

Carter v. Burch,
34 F.3d 257 (4th Cir. 1994) 11

Imbler v. Pachtman,
424 U.S. 409 (1976) 11

United States Constitution

Fourth Amendment 1, 3

Fifth Amendment 1

Sixth Amendment 1

Fourteenth Amendment 1

Statutes

42 U.S.C. § 1981 1

42 U.S.C. § 1983 ..... 1, 11

42 U.S.C. § 1985 1

Cited Authorities

Page

Rules

U.S. Sup. Ct. R. 10 ..... 6, 10, 11

U.S. Sup. Ct. R. 10(a) 6

U.S. Sup. Ct. R. 10(c) 6

U.S. Sup. Ct. R. 14(a) 3, 7

U.S. Sup. Ct. R. 14(h) 7

STATEMENT OF THE CASE

Petitioners filed a Complaint alleging violations of their civil rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution and under sections 42 U.S.C. § 1981, § 1983 and § 1985, arising out of their arrest and prosecution for misdemeanor charges. (Petitioners' Appendix "Pet'r App.", at 66a-103a). Petitioners named 10 defendants seeking $500,000.00 in compensatory damages and $30,000,000.00 in punitive damages. All Respondents filed motions to dismiss and memoranda in support. (Pet'r App. at 104a-109a). Petitioners' counsel also filed a Notice of Hearing in which he attached a copy of the transcript of the trial of August 2, 2006, and indicated that during oral argument he intended to rely upon that transcript in responding to Respondents' motions to dismiss. (Joint Appendix filed with the Fourth Circuit "J.A." at 187).

The District Court issued a memorandum opinion and final order granting the Respondents' motions to dismiss. (Pet'r App. at 19a-65a). Petitioners appealed to the Fourth Circuit Court of Appeals. Petitioners did not appeal that portion of the District Court's Order dismissing the 42 U.S. C. § 1981 and § 1985 claims, and dismissing the claims of monetary relief against Respondent Payne in his official capacity based upon Eleventh Amendment immunity. (*See* Pet'r App. at 15a).

The Fourth Circuit affirmed the dismissal of all claims. (Pet'r App. 1a-16a). Specifically, the Fourth Circuit found that (1) the District Court properly considered the trial transcript in ruling on the motions

to dismiss as it was the Petitioners' counsel who referenced the transcript in the Complaint and stated his intention to rely upon it in responding to the motions to dismiss; (2) Petitioners' claims of excessive force, violations of due process, illegal entry, illegal search and seizure relating to the February 16, 2006 arrest were time-barred[1]; (3) Petitioners' claims of conspiracy against all Respondents were conclusory and without factual support as there were no facts establishing a meeting of the minds; (4) Respondent Payne was entitled to absolute immunity from liability for damages for conspiring with police officers to present false testimony and for withholding exculpatory evidence prior to trial; (5) Petitioners' claims that Respondent Payne advised the officers to arrest them on fabricated charges on February 16, 2006, were conclusory and without factual support as there were no allegations that Respondent Payne knew about, gave advice regarding, or otherwise participated in the arrest and search[2]; and (6) State Respondents Rader and Kaine were entitled to qualified immunity for their decision not to prosecute law enforcement officers and that State Respondents Dion and McDonnell were entitled to absolute prosecutorial immunity for the same decision. (Pet'r App. 1a-16a).

---

1. Contrary to the Petitioners' contention in their petition, the Fourth Circuit did NOT find that the claims of conspiracy were time barred. (Pet'r App. at 8a-9a).

2. The Fourth Circuit found in the alternative that such claims also were barred by the two year applicable statute of limitations. (Pet'r App. at 12a).

Petitioners do not challenge that the officers' entry onto the Petitioners' property did not violate the Fourth Amendment; instead, Petitioners merely argue that the officers violated the Petitioners' constitutional rights through their alleged malicious wounding and arrest of Petitioners following their entry onto the property. (Petition for Writ of Certiorari "Pet." at 13–17). Only the questions set out in the petition, or fairly included therein, will be considered by the Court. Sup. Ct. R. 14(a).

STATEMENT OF FACTS

The Nelson County Respondents[3]

This suit arose out of an incident on February 16, 2006 involving Deputy McCarthy of the Nelson County Sheriff's Department and Petitioners Don Smith and Donna Smith. On that day, McCarthy and Deputy Bridgwater went to the Smiths' property to determine whether Donna Smith's son, David Reier, was present there. (Pet'r App. at 74a-75a). The Sheriff's Department had received a *capias* for Reier's arrest. (Pet'r App. at 70a). McCarthy and Bridgwater were following up on reports that David Reier had been seen in the area driving a green truck. (Pet'r App. at 74a-75a).

The Complaint alleges that none of the houses or improvements or the ground surrounding them are visible from the road. (Pet'r App. at 69a). The officers

---

3. The "Nelson County Respondents" are Michael R. McCarthy, Malcolm E. Bridgwater, John M. Dixon, II and Gary L. Brantley.

drove up the driveway where they found a green pickup truck parked next to the house. (Pet'r App. at 70a). While the officers were present on the property, Donna Smith returned to the property in a van. (Pet'r App. at 71a-72a).

McCarthy questioned Donna Smith about the whereabouts of her son. (Pet'r App. at 71a). McCarthy then attempted to look into the back of Donna Smith's van, but Donna Smith "maneuvered her body so as to place the same between McCarthy and the van's door with her back to McCarthy and her arms spread-eagled across the van in a protective position." (Pet'r App. at 72a). A physical altercation ensued. (Pet'r App. at 72a).

During the struggle, Don Smith arrived in his car. He grabbed McCarthy's shirt in an attempt to intervene. (Pet'r App. at 72a). Immediately following the altercation, both Donna Smith and Don Smith were arrested for obstruction of justice. (Pet'r App. at 72a-73a). Deputy Dixon and Sheriff Brantley then arrived on the scene. (Pet'r App. at 73a). The Complaint alleges that after the arrest, Bridgwater, McCarthy, Dixon, and Brantley spoke together out of the earshot of the Smiths and at times appeared to speak on cell phones. (Pet'r App. at 73a).

Petitioners allege that at the trial, Deputies McCarthy and Bridgwater provided false testimony. (Pet'r App. at 74a-77a). Petitioners allege that after hearing the evidence, the judge acquitted Don Smith, but convicted Donna Smith of obstruction of justice. (Pet'r App. at 77a). Donna Smith did not appeal her conviction. (Pet'r App. at 80a-81a). Petitioners allege a violation of their constitutional rights based upon these events.

Defendant Payne

Petitioners allege that they retained Bruce Tyler (who is also their attorney in this case) to represent them with respect to the two misdemeanor charges. (Pet'r App. at 73a-74a). Petitioners allege that on May 10, 2006, Respondent Phillip D. Payne, IV, who was acting in his capacity as the prosecuting attorney, gave Mr. Tyler "unsolicited" documents consisting of a "confidential supplement" and dispatch logs. (Pet'r App. at 73a-74a). Petitioners allege that approximately one week before the trial, which was scheduled on August 2, 2006, Mr. Tyler mailed letters dated July 25, 2006, requesting what he characterizes as exculpatory evidence.[4] (Pet'r App. at 74a). Petitioners complain that Mr. Tyler did not receive the names of those deputies prior to trial. (Pet'r App. at 74a). There are no allegations that Petitioners ever brought this issue to the attention of the trial judge during the Petitioners' trial for obstruction of justice.

There are no allegations in the Complaint, or in the attachments to the Complaint that Respondent Payne knew about, gave advice regarding, or otherwise

---

4. The letter which was attached to the Complaint as Exhibit D (Pet'r App. at 92a-93a) actually asks for the names of the deputies who had been at the residence the night before the arrest and who had seen the green truck at a different location on the Smith's property. The Smiths claim that those deputies may have had knowledge that the truck located on the premises was registered to a Maryland man and not to Donna Smith's son, an issue which the Smiths claim was relevant to a determination of probable cause to be on the premises. (Pet'r App. at 74a).

participated in the Petitioners' arrest. Petitioners' counsel argues after the fact that he has "evidence" that Respondent Payne conspired with the officers on the day of the arrest, but no such evidence or allegation is set forth in the Complaint or its attachments.

REASONS FOR DENYING THE PETITION

A. Petitioners Fail to State Compelling Reasons to Grant a Petition for Writ of Certiorari.

This Court will grant a petition for a writ of certiorari only for compelling reasons. Sup. Ct. R. 10. The types of compelling reasons considered by this Court include: a dispute among the U.S. Courts of Appeals, a decision by a U.S. Court of Appeals that has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's supervisory power, or a U.S. Court of Appeals decides an important and unsettled question of federal law. Sup. Ct. R. 10(a), (c). Rarely is a petition for a writ of certiorari granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10.

In this case, Petitioners do not point to any of the compelling reasons cited in Rule 10 to support their Petition for Writ of Certiorari. Instead, Petitioners merely argue that the Fourth Circuit misapplied what they repeatedly call "well established" federal law. (*See* Pet. at 5, 7; 12; *see also* Pet. at 17, 23–25). This is

the very type of reason that rarely serves as the basis for review by this Court.[5]

B. Petitioners Cannot Successfully Challenge the Lower Court's Decision to Consider the Criminal Trial Transcript as it Was Petitioners Who Referenced it in the Complaint, Filed it with the Court and Gave Written Notice That They Intended to Rely upon it in Responding to the Motions to Dismiss.

Petitioners assert that the District Court erred in considering the criminal trial transcript in determining the Respondents' Motions to Dismiss. However, this assertion is not a valid basis for granting a writ of certiorari, particularly since it was counsel for Petitioners who referenced the trial transcript in the Complaint, filed it with the court and gave written notice that he intended to rely upon it in responding to the

5. Moreover, under Rule 14, the questions presented should be short and should not be argumentative or repetitive, and the argument should be direct and concise. Sup. Ct. R. 14(a) and (h). In this case, Petitioners' brief is replete with argumentative and conclusory statements. Petitioners go so far as to call both the Fourth Circuit and the District Court "judicially dishonest," (Pet. at 10-11), and to call the Fourth's Circuit's decision "highly unethical." (Pet. at 10-11, i). Petitioners accuse the Fourth Circuit of "obviously intending" to shield the officers for their "egregious violation" of constitutional rights simply because the Fourth Circuit would not be bound by the Petitioners factually unsupported and ofttimes incredible conclusions. (Pet. at i). These kinds of statements and arguments are in violation of the Supreme Court rules and do not justify the granting of the petition for writ of certiorari.

motions to dismiss. The Fourth Circuit correctly found that the use of the transcript was proper, and that the Petitioners' challenge was barred:

> The Smiths cited to the trial transcript in their complaint, and their counsel filed a copy of the transcript with the District Court, citing his intention to rely upon it in argument on the motions to dismiss. As such, they cannot now justifiably complain about the District Court's consideration of the transcript in rendering its decision or on its reliance on the facts as determined in that proceeding.

(Pet'r App. at 7a).

In spite of having asked the District Court to consider that transcript, Petitioners nevertheless accuse the Fourth Circuit and the District Court of being judicially dishonest for relying upon the portions of the transcript that the Petitioners do not like. (Pet. at 9-12). This ground is nothing more than an assertion of an erroneous factual finding or the misapplication of a properly stated rule of law which rarely serves as a reason to grant a petition for writ of certiorari.

C. Petitioners Misstate the Findings of the Courts below Regarding the Applicability of the Statute of Limitations to Petitioners' Conspiracy Claim.

Petitioners state that the District Court and the Fourth Circuit erroneously held that the conspiracy claim was barred by the statute of limitations. To the contrary, the Fourth Circuit confirmed that only the Petitioners' claims of excessive force, violations of due

process, illegal entry, illegal search and seizure against individual defendants relating to the February 16, 2006 arrest were time-barred. The Fourth Circuit specifically stated that neither it nor the District Court included the conspiracy claims in its dismissal on statute of limitations grounds. (Pet'r App. at 8a-9a). Yet, two of Petitioners "questions presented" concern Petitioners' assertions that the lower courts erred in ruling that the statute of limitations barred the conspiracy claims. (Pet. at iii).

Regardless of Petitioners' perception of the lower courts' holdings, Petitioners' assertion is essentially one of a misapplication of a properly stated rule of law which rarely serves a reason for this Court to grant review.

D. Petitioners' Naked Assertions of Conspiracy Are Without Factual Support and Do Not Meet the Plausibility Standard Set Forth by this Court in *Ashcroft v. Iqbal*.

In determining the sufficiency of a complaint, Rule 8 requires that a plaintiff plead more than "unadorned, the-defendant-unlawfully-harmed-me-accusations." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50, 173 L. Ed. 2d 868, 883-84 (2009). A pleading that offers labels or conclusions or a "formulaic recitation of the elements of a cause of action is insufficient. *Id.* The claim must be plausible on its face. *Id.* The complaint must contain more than a "sheer possibility." *Id.* Facts that are merely consistent with a defendant's liability fall short of the pleading standard. *Id.*

The Fourth Circuit properly concluded that any allegations of a conspiracy failed as a matter of law, because Petitioners failed to allege a meeting of the minds. (Pet'r App. at 10a). The Fourth Circuit noted that the Petitioners' conspiracy claim against the law enforcement officers was based solely on the allegation that those officers "conferred at times as an entire group and at times in smaller groups out of earshot of Petitioners and appeared at times to be talking on cell phones." (Pet'r App. at 10a). The Fourth Circuit found that this allegation did not sufficiently allege a "meeting of the minds," and thus could not survive a motion to dismiss. (Pet'r App. at 10a).

Likewise with the conspiracy claim against Respondent Payne, the Fourth Circuit held there were no specific allegation that Respondent Payne knew about, gave advice regarding, or otherwise participated in the arrest and search.(Pet'r App. at 12a). Petitioners point to the allegation that they observed officers on cell phones at the scene, then jump to the conclusion that the officers must be talking with Respondent Payne. These types of allegations are conclusory in nature and fall far short of meeting the plausibility standard set forth in *Iqbal*. Even if the Fourth Circuit made an error of fact or misapplied the law, such error does not constitute a compelling reason to justify this Court's review. *See* Sup. Ct. R. 10.

E. The Fourth Circuit Correctly Held That Respondent Payne Enjoyed Absolute Immunity for Claims of Conspiring to Present False Testimony and for Withholding Exculpatory Evidence Prior to Trial.

In initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under 42 U.S.C. § 1983. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). Conspiring to present false testimony and failure to provide exculpatory evidence prior to trial clearly falls within the function of "initiating a prosecution and presenting the State's case." *Carter v. Burch*, 34 F.3d 257, 262-63 (4th Cir. 1994). With regard to the claims that Respondent Payne conspired and advised the police officers to arrest the Smiths on fabricated charges back on February 16, 2006, the Fourth Circuit found that Respondent Payne was entitled to qualified immunity only. (Pet'r App. at 12a). Nevertheless, the Fourth Circuit correctly held there were no specific allegation that Respondent Payne knew about, gave advice regarding, or otherwise participated in the arrest and search. (Pet'r App. at 12a). These types of allegations are conclusory in nature and fall far short of meeting the plausibility standard set forth in *Iqbal*. Even if the Fourth Circuit made an error of fact or misapplied the law as Petitioners suggest, such error does not constitute a compelling reason to justify review by this Court under Rule 10.[6]

6. With regard to the claims against the State Respondents, the Fourth Circuit correctly found that Rader and Kaine were entitled to qualified immunity for their decision not to prosecute law enforcement officers and Dion and McDonnell were entitled to absolute prosecutorial immunity for the same decision. (Pet'r App. at 13a-14a).

CONCLUSION

For the above reasons, Petitioners' Petition for Writ of Certiorari should be denied as Petitioners raise no compelling reason to grant the petition.

Respectfully submitted,

ROSALIE PEMBERTON FESSIER
Counsel of Record
TIMBERLAKE, SMITH, THOMAS
& MOSES, P. C.
25 North Central Avenue
P. O. Box 108
Staunton, VA 24402-0108
(540) 885-1517
rfessier@tstm.com

Counsel for Respondent Payne

JAMES M. BOWLING, IV
ST. JOHN, BOWLING, LAWRENCE
& QUAGLIANA, LLP
416 Park Street
Charlottesville, VA 22902
(434) 296-7138

Counsel for Respondents McCarthy, Bridgwater, Dixon and Brantley

172

(3)

No. 09-1303

Supreme Court, U.S.
FILED
SEP 2 3 2010
CLERK

In The Supreme Court of the United States

DON W. SMITH AND DONNA L. SMITH,
Petitioners,

v.

MICHAEL R. MCCARTHY,
IN HIS INDIVIDUAL CAPACITY AND IN HIS CAPACITY AS A NELSON COUNTY DEPUTY SHERIFF, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF

Bruce Karl Tyler
ATTORNEY AT LAW
Post Office Box 2
129 Afton Depot Lane
Afton, Virginia 22920-0002
(540) 943-0932
aftonlaw@cfw.net

Counsel of Record for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

REPLY BRIEF
TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES.....iv

ARGUMENT.....1

I. STATE RESPONDENTS, PRESENT GOVERNOR ROBERT F. MCDONNELL, PAST GOVERNOR TIMOTHY M. KAINE, SHANNON Y. DION AND JOSEPH L. RADER FAILED TO FILE A BRIEF IN OPPOSITION TO THE SMITHS' PETITION WHICH, AS TO THEM, IS UNANSWERABLE.....1

II. THE BRIEF IN OPPOSITION FILED BY THE REMAINING RESPONDENTS FAILS IN ALL RESPECTS TO COMPLY WITH THE ADMONITION OF RULE 15 THAT IT "ADDRESS ANY PERCEIVED MISSTATEMENT OF FACT OR LAW IN THE PETITION" AS IT RELATES TO ISSUES WHICH COULD COME BEFORE THE SUPREME COURT.....2

III. RESPONDENTS' ARGUMENT "A", CLAIMING THAT PETITIONERS HAVE NOT SHOWN "COMPELLING REASONS" FOR THE GRANTING OF THE WRIT OF CERTIORARI, IS WHOLEY WITHOUT MERIT.....4

IV. RESPONDENTS' ARGUMENT B, RELATING TO THE LOWER COURTS' "CONSIDERATION" OF THE TRIAL TRANSCRIPT IS NONSENSICAL AND DOES NOT ADDRESS THE WELL-ESTABLISHED LAW WHICH DICTATES HOW THE COURTS SHOULD HAVE CONSIDERED THE TRIAL TRANSCRIPT. 6

V. RESPONDENTS' CLAIM THAT PETITIONERS HAVE MISSTATED THE LOWER COURTS' STATUTE OF LIMITATIONS ANALYSIS IS UNTRUE, AND IN ADDITION, ONCE THE COMPLAINT WAS TIMELY FILED, THE ULTIMATE OBJECTIVE OF THE CONSPIRACY WAS CHANGED TO OBTAINING JUDICIAL VALIDITY OF THE CORRUPT AUGUST 2, 2006, CONVICTION, SO THAT THE STATUTE OF LIMITATIONS HAS NOT YET RUN UNDER THE DECISION OF THE UNITED STATES SUPREME COURT IN *GRUNEWALD V. UNITED STATES*, 353 U.S. 391, 77 S. Ct. 963, 1 L. Ed.2d 931 (1957)....7

VI. RESPONDENTS' ARGUMENT "D", CLAIMING THERE ARE NO FACTS IN THE COMPLAINT SUPPORTING A CONSPIRACY SO THAT THE COMPLAINT FAILS TO MEET THE STANDARD OF PLAUSIBILITY SET FORTH IN *ASHCROFT V. IQBAL*, IS FRIVOLOUS AND WHOLLY WITHOUT MERIT. 10

VII. RESPONDENT PAYNE'S ARGUMENT "E" MAY BE CORRECT WITH RESPECT TO HIS "ENJOYMENT" OF ABSOLUTE IMMUNITY, BUT FAILS IN ALL OTHER RESPECTS AS A BASIS

WARRANTING HIS DISMISSAL FROM THE CASE. 11

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

Cases

Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).....10

Buckley v. Fitzsimmons, 509 U.S. 259 (1993)..4, 12

Burns v. Reed, 500 U.S. 478 (1991).....4, 11

Grunewald v. United States, 353 U.S. 39 (1957).....8, 9

United States Constitution

Seventh Amendment 5, 11

Rules

U.S. Sup. Ct. R. 10 4

U.S. Sup. Ct. R. 10(a) 5

U.S. Sup. Ct. R. 10(c) 5

U.S. Sup. Ct. R. 15 .....1, 2

Rule 12(b)(6) Fed. Rules of Civil Proc.....6, 7, 10

ARGUMENT

I. STATE RESPONDENTS, PRESENT GOVERNOR ROBERT F. MCDONNELL, PAST GOVERNOR TIMOTHY M. KAINE, SHANNON Y. DION AND JOSEPH L. RADER FAILED TO FILE A BRIEF IN OPPOSITION TO THE SMITHS' PETITION WHICH, AS TO THEM, IS UNANSWERABLE.

State respondents, Governor Robert F. McDonnell, past Governor Timothy M. Kaine, Assistant Attorney General and Virginia State Police Counsel Shannon Y. Dion and State Trooper Joseph L. Rader failed to file a brief in opposition. Considering that the petition had nothing at all positive to say about these respondents, one would imagine that these respondents would "perceive" a misstatement of fact or law within the meaning of Supreme Court Rule 15. By failing to respond, and because none of the petition was defective in any way as to the issue of jurisdiction, those respondents may have waived any objection and defenses to the petition because their alleged ratification of the corrupt trial of August 2, 2006, is unanswerable.

Perhaps the certain prospect of a motion to disqualify the Virginia Attorney General's Office from representation of respondents was one reason for the failure to file a brief. The self-evident grounds justifying disqualification are premised on a foundation principle of American jurisprudence that the Smiths are entitled, as law-abiding, innocent victims of crime, which they have clearly showed themselves to be, to have the Commonwealth discharge her duty of protecting them as such. That

duty of protection, by its inherent nature, absolutely prohibits the Commonwealth from defending the egregious conduct which led to the victimhood. Avoidance of this absolute prohibition is why respondents repeatedly attempt to mischaracterize the nature of the Smiths' complaint as their mere desire that perjury be prosecuted.

II. THE BRIEF IN OPPOSITION FILED BY THE REMAINING RESPONDENTS FAILS IN ALL RESPECTS TO COMPLY WITH THE ADMONITION OF RULE 15 THAT IT "ADDRESS ANY PERCEIVED MISSTATEMENT OF FACT OR LAW IN THE PETITION" AS IT RELATES TO ISSUES WHICH COULD COME BEFORE THE SUPREME COURT.

Respondents' brief fails to comply with the requirement of Supreme Court Rule 15 that the brief address "any perceived misstatement of fact or law in the petition" as it relates to issues which could be before the court. The arguments are wholly without merit, leaving uncontested almost every statement of law and fact made by petitioners.

First, nowhere in the brief in opposition do respondents address the statements of fact and law that both courts failed in their duty to assume that all allegations of the complaint are true; to construe the complaint in the light most favorable to petitioners; to make all reasonable inferences in favor of petitioners and to determine, under any reasonable reading of the complaint, that petitioners are entitled to relief.

Second, other than a nonsensical argument to justify the judicial usurpation of the jury's function by validating a corrupt conviction, the brief failed to address the statements made in the petition that the Fourth Circuit approved the District Court's improper use of the trial transcript of the prosecution which was alleged in the complaint as the objective of a civil conspiracy and the knowing reliance of both courts on false evidence in approving the corrupt conviction of petitioner Donna L. Smith.

Third, the brief failed to address the statements made in the petition that the Fourth Circuit circumvented well-established limitation of actions law based on conspiracy in dismissing the claims of the Smiths on the basis that they were barred by the applicable statute of limitations. However, the statute of limitations has not yet run because of a change in the ultimate objective of the conspiracy.

Fourth, the brief failed to address the statements made in the petition complaining of the both lower courts' grant of qualified immunity to respondents McCarthy, Bridgwater, Dixon and Brantley, even though they had the burden of proof, and in spite of the detailed allegations of the complaint showing joint and several constitutional violations, including malicious wounding, breach of duty to arrest, illegal arrest, search, seizure and imprisonment, fabrication and/or alteration of evidence, failure to provide exculpatory evidence, reckless or callous supervisory indifference to petitioners' rights, and perjury.

Fifth, the brief failed to address the statements made in the petition that the Fourth Circuit circumvented law by affirming the dismissal of respondent Payne as absolutely immune even though Payne had the burden of proof, and in spite of the detailed allegations of the complaint showing his advice to the sheriff defendants and administration of the prosecution conspiracy outside of the judicial process continuing to this very day and in doing so, disregarded the decisions of this Court in *Burns v. Reed*, 500 US. 478 (1991) and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

III. RESPONDENTS ARGUMENT "A", CLAIMING THAT PETITIONERS HAVE NOT SHOWN "COMPELLING REASONS" FOR THE GRANTING OF THE WRIT OF CERTIORARI, IS WHOLLY WITHOUT MERIT.

Respondents' entire Argument "A" consists of a paraphrase of the provisions of Supreme Court Rule 10 in the first paragraph and two misleading statements in the second paragraph. The first false statement claims that petitioners "do not point to any of the compelling reasons cited in Rule 10 to support their petition for writ of certiorari." Yet on the first page of their petition, petitioners clearly state that the decision of the Fourth Circuit Court of Appeals "directly conflicts with the holdings of every Circuit Court of Appeals....which has considered the issues and numerous decisions of the United States Supreme Court." (Pet. at i). There is no need for petitioners to perform a detailed analysis of a circuit-by-circuit review of the conflicts when they are self-evident and repeatedly documented in the petition

which contains citations from the Second, Third, Fourth, Fifth, Seventh and Ninth Circuit Court of Appeals and the United States Supreme Court, everyone of which directly conflict with the decision of the Fourth Circuit Court of Appeals before this Court. Sup. Ct. Rule 10(c).

The second misleading statement purports to mischaracterize the compelling reasons for granting the writ as a "mere argument" that the Fourth Circuit "misapplied" federal law. Respondents use this "reduction" and "misapplication" approach in all their arguments in an attempt to divert the attention of this Court. (Resp. Br. pp. 6, 8, 9, 10, 11). The petition is emphatically not a *mere* argument about a *mere* application of the law. The petition states at the outset, and proves, that both lower courts flagrantly violated and circumvented law in highly unethical decisions to extricate the respondents from their predicament and in doing so, both courts deprived petitioners of their Seventh Amendment right to a jury trial. The petition clearly demonstrates that the Fourth Circuit has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. Rule 10(a).

Finally, Argument A ends with a footnote claiming that petitioners' should be denied a writ because they characterize the two lower courts as "judicially dishonest" and "obviously intending" to protect all respondents from the consequences of their illegal actions, claiming that petitioners have made "argumentative and conclusory statements"

which are "factually unsupported" with "ofttimes incredible conclusions." The factual support which clearly establishes the "judicial dishonesty" and "obvious intent" of both the District Court and the Fourth Circuit are found in the decisions themselves. The reasoning of the opinions is tortured at best and totally ignores the essential issues of the case, which it must do if respondents are to escape liability. The respondents are the only parties before this Court making "argumentative and conclusory statements" which are "factually unsupported and reaching "ofttimes incredible conclusions."

IV. RESPONDENTS' ARGUMENT "B", RELATING TO THE LOWER COURTS' "CONSIDERATION" OF THE TRIAL TRANSCRIPT IS NONSENSICAL AND DOES NOT ADDRESS THE WELL-ESTABLISHED LAW WHICH DICTATES HOW THE COURTS SHOULD HAVE CONSIDERED THE TRIAL TRANSCRIPT.

Respondents again make misleading statements and begin, in their Argument B, by avoiding the threshold issue of **how** each court was obligated to consider the transcript. Of course, the complaint made reference to the trial transcript because the trial transcript is the basis of the corrupt conviction is the essential basis of petitioners' claims. Had the Smiths failed to hire a court reporter for the August 2, 2006, trial, Donna Smith's corrupt conviction would have been history. Any references to the transcript indicated multiple instances of perjury on relevant issues and under an appropriate disposition of a Rule 12(b) motion, both

courts were obligated to assume the perjury to have occurred even if it weren't proven on the face of the complaint.

Petitioners never asked the District Court to consider the transcript, assuming the court would read it to understand the true nature of the August 2, 2006, trial, and then rule according to the law governing Rule 12(b) motions. Petitioners' attorney did not refer to the transcript during the December 19, 2008, because there was no need to. Respondents' intimation that petitioners' accusation of judicial dishonesty is solely based on both courts' "relying upon portions of the transcript that the Petitioners do not like" is beneath contempt. What petitioners "do not like" about both courts is their reliance on what is clearly and convincingly corrupt conviction. If the Court grants the writ, the transcript will be part of the record. No reasonably educated judge or lawyer could read it without being firmly convinced that the Commonwealth fixed the outcome of the trial.

V. RESPONDENTS' CLAIM THAT PETITIONERS HAVE MISSTATED THE LOWER COURTS' STATUTE OF LIMITATIONS ANALYSIS IS UNTRUE, AND ONCE THE COMPLAINT WAS TIMELY FILED, THE ULTIMATE OBJECTIVE OF THE CONSPIRACY WAS CHANGED TO OBTAINING JUDICIAL VALIDITY OF THE CORRUPT AUGUST 2, 2006, CONVICTION, SO THAT THE STATUTE OF LIMITATIONS HAS NOT YET RUN UNDER THE DECISION OF THE UNITED STATES SUPREME COURT IN

GRUNEWALD V. UNITED STATES, 353 U.S. 391, 77 S. Ct. 963, 1 L. Ed.2d 931 (1957).

Petitioners' argument that the lower courts' holdings relative to application of the statute of limitations to petitioners' claims of conspiracy are vague and muddled remains in full force and effect unaffected by respondents' contribution to that confusion in their brief. This is a very simple issue and the very fact that the respondents fail to see its simplicity is indicative of their desire to find some escape from liability for their egregious acts.

The malicious wounding of Donna Smith by McCarthy is the basic operative fact when dealing with the limitations issue. That same malicious wounding marks the onset of the conspiracy which begins precisely when Donna Smith is in the ditch being brutally handcuffed by McCarthy and Bridgwater, rather than arresting McCarthy for the felony committed in his presence, chooses instead to subdue Don Smith who attempted to save his wife from McCarthy's brutality. Everything that happened thereafter would be heard by the jury, after discovery had been completed and the case came to trial, including the excessive force used by McCarthy and Bridgwater in subduing the Smiths, the arrest of the Smiths, and all other acts of the respondents Payne, McCarthy, Bridgwater, Dixon and Brantley leading to the conviction of Donna Smith on August 2, 2006.

However, the timely filing of the complaint changed the ultimate objective of the conspiracy. Once the complaint was timely filed, all respondents

were deprived of an affirmative statute of limitations defense. So deprived, respondents, if they were to escape liability, had no choice but to the change the ultimate objective of the conspiracy to obtaining judicial approval of the corrupt conviction. Instructive in this regard is the decision of this Court in *Grunewald v. United States*, 353 U.S. 391, 77 S. Ct. 963, 1 L. Ed.2d 931 (1957) in which the government argued that the central aim of the conspiracy was to obtain for the taxpayer defendants not only a 'no prosecution' ruling from the Internal Revenue Service but absolute immunity for *any* tax prosecution. Since that immunity would not be attained until the criminal statute of limitations ran on the tax cases which the taxpayers undertook to 'fix', this Court essentially ruled that the prosecutions were timely brought. Applying the reasoning of *Grunewald* to the case at bar, the August 2d conviction of Donna Smith equates with the "no prosecution" ruling and the judicial validation of a corrupt conviction by the District Court and the Fourth Circuit equates to the deadline of the five year statute in *Grunewald*. Unless this Court affirms the Fourth Circuit, the statute of limitations has not yet run on the Smiths' claims for the wrongful acts of respondents and others, whether before or after August 2, 2006. Under this most compelling analysis, once this case is remanded to the District Court for trial, a large number defendants could conceivably be joined as defendants. Petitioners foresaw this probability because the last listed defendants in the caption of their complaint are described as "UNKNOWN DEFENDANTS, in their individual capacities and in their capacities as employees of the Virginia State

Police, the Attorney General and/or the Governor." (App. at 67a).

VI. RESPONDENTS' ARGUMENT "D", CLAIMING THERE ARE NO FACTS IN THE COMPLAINT SUPPORTING A CONSPIRACY SO THAT THE COMPLAINT FAILS TO MEET THE STANDARD OF PLAUSIBILITY SET FORTH IN *ASHCROFT V. IQBAL*, IS FRIVOLOUS AND WHOLLY WITHOUT MERIT.

The first paragraph of respondents' argument "D" recites the law which both courts were obligated to follow when passing on the sufficiency of the complaint and, of course, ignores the law which repeatedly is cited by the petitioners as controlling. The second and third paragraphs are no more than a regurgitation of portions of the opinion of the Fourth Circuit with a conclusory statement that the complaint failed to meet the plausibility standard discussed by this Court in *Ashcroft v. Iqbar*, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) which decision did not change one iota the well-established law that any court, when passing on a Rule 12(b)(6) motion, must assume that all allegations of the complaint are true, must construe the complaint in the light most favorable to petitioners, must make all reasonable inferences in favor of petitioners and must determine, under any reasonable reading of the complaint, whether petitioners are entitled to relief. In short, the complaint overwhelmingly satisfies the standard of plausibility enunciated in *Ashcroft v. Iqbar*.

Petitioners have addressed the frivolity of this argument which assumes the facts set forth in the complaint are the sum total of the evidence which petitioners could muster at trial. The argument is akin to the analysis which a court would make when ruling on a motion for judgment of acquittal in a criminal prosecution. Perhaps respondents understandably perceive the complaint as a prosecution. But petitioners stress that this is a civil matter, appropriately filed and pleaded, and both courts' denial of their rights to discovery and their Seventh Amendment right to a jury trial is the reason for their petition.

VII. RESPONDENT PAYNE'S ARGUMENT "E" MAY BE CORRECT WITH RESPECT TO HIS "ENJOYMENT" OF ABSOLUTE IMMUNITY, BUT FAILS IN ALL OTHER RESPECTS AS A BASIS WARRANTING HIS DISMISSAL FROM THE CASE.

Respondent Payne's Argument "E", another regurgitation of the Fourth Circuit opinion, *may* be correct as to his alleged absolute immunity for suborning perjury and withholding of exculpatory evidence. However, as previously stated, at least at this stage, the Fourth Circuit was clearly in error in so ruling because the Smiths were entitled to discovery in order to determine what further role Payne may have had in the prosecution conspiracy after which Payne would have the burden of showing to a jury, or the court on a motion for summary judgment, that absolute immunity is justified for the function in question under the decision of the United States Supreme Court in *Burns v. Reed*, 500 U.S.

478 (1991) and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). The complaint clearly shows that Payne orchestrated a fixed trial to convict Donna Smith in order to defeat her claim for personal injuries. Absolute immunity cannot possibly be justified for *that* function.

Respondent Payne concedes that he would only be entitled for qualified immunity if he conspired with and advised the police officers to arrest the Smiths but seeks to avoid liability by relying on the conclusory statement of the Fourth Circuit that there was "no specific allegation that Respondent Payne Knew about, gave advice regarding, or otherwise participated in the arrest and search." This statement is untrue because under a required reading of the complaint, Payne *extrajudicially* advised the arrests of the Smiths on fabricated charges, *extrajudicially* advised the alteration, enlargement or deletion of the dispatch records, *extrajudicially* authored or directed the writing of the Confidential Supplement and *extrajudicially* advised the perjured testimony which he presented at trial. Also, after the trial, beginning with his receipt of the initial mailing from Tyler in February, 2007, and continuing to the present, Payne has been *extrajudicially* conducting the policy of denial and stonewalling, all clearly shown in the second count of the complaint.

CONCLUSION

Petitioners again respectfully request that the Supreme Court grant review of this matter for the foregoing reasons as well as the following:

1. Respondents McDonnell, Kaine, Dion and Rader have failed to file a brief in opposition and the statements of law and fact made by the petitioners with respect to their liability should be deemed as admitted under Supreme Court Rule 15.

2. Respondents Payne, McCarthy, Bridgwater, Dixon and Brantley have failed to address in any meaningful manner the statements of law and fact made in the petition with respect to them and the argument made by the petitioners with respect to their liability should be deemed as admitted under Supreme Court Rule 15.

Respectfully submitted,

Bruce Karl Tyler
ATTORNEY AT LAW
Post Office Box 2
129 Afton Depot Lane
Afton VA 22920-0002
(540) 943-0932
aftonlaw@cfw.com